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Democracy and Tort Law in America: The Counter-Revolution

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DEMOCRACY AND TORT LAW IN AMERICA: THE COUNTER-REVOLUTION

Christopher J. Roederer*

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“Leading Political Scientists Warn of Threat to American Democracy in Rare Nonpartisan Statement”¹

I. INTRODUCTION

The United States has spent billions of dollars and has put the lives of its soldiers on the line for the purported purpose of spreading democracy in other countries,² while at the same time, Americans have allowed their own democracy to come under threat. The threat does not come from abroad, but is homegrown. It is bound up in a vicious cycle of both economic and political inequality, the centrifugal forces of which have created an ever-widening gap between those who have and those who do not have: a stake in America, a voice and hand in shaping America’s future, and the ears of others who are shaping that future.

¹ Press Release, American Political Sci. Ass’n, *Leading Political Scientists Warn of Threat to American Democracy in Rare Nonpartisan Statement* (2004), <http://www.apsanet.org/imgtest/taskforcepress.pdf>. See also E. J. Dionne Jr., *Poor Version of Democracy*, WASHINGTON POST, June 11, 2004, at A25 (calling attention to and commenting on the Task Force report), available at <http://www.washingtonpost.com/wp-dyn/articles/A33144-2004Jun10.html>. Although not conceived as such, this Article, in effect, is a response to the challenge raised by Nockleby and Curreri, “that those who wish to defend the civil justice system against retrenchment should explicitly address how the legal system changed from 1900 to 1980 to grant far more protections to citizens.” John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1023 (2005).

² There have been between 76,075 and 82,883 Iraqi civilian deaths since the beginning of the war according to The IRAQ BODY COUNT Database, <http://www.iraqbodycount.org/> (last visited Nov. 4, 2007). There have been over 3,849 American military casualties since the beginning of the war, <http://www.antiwar.com/casualties/> (last visited Nov. 4, 2007). As of Nov. 4, 2007, there have been 4,142 coalition deaths, <http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties> (last visited Nov. 4, 2007). By the end of 2006 the U.N. High Commission for Refugees estimated that some 3 million Iraqis had been displaced (about half within the country and half outside of the country). Patrick Cockburn, *Review of the Year: Iraq (A Nation Soaked in Blood Tears Itself Apart)*, THE INDEPENDENT, Dec., 29, 2006, http://news.independent.co.uk/world/middle_east/article2110653.ece. The economic costs are well over \$400 billion for Iraq alone and over 600 billion if Afghanistan and other expenditures on the war on terror are included. AMY BELASCO, CONGRESSIONAL RESEARCH SERVICE, *THE COST OF IRAQ, AFGHANISTAN AND THE OTHER GLOBAL WAR ON TERROR EXPENDITURES SINCE 9/11* 4 tbl.1 (2007), available at <http://www.fas.org/sgp/crs/natsec/RL33110.pdf>.

This gap between the “haves” and “have nots” cuts across both socio-economic aspects of life (education, jobs, income, mobility) and civil and political aspects of life (the ability to participate in civic and political life, through voting, volunteering, protesting, donating, etc.). This gap skews both the input into those who are elected to represent the people and the output, or the responsiveness, of those elected to serve the needs and preferences of the people. Gross inequality in political voice is bound up with a lack of responsiveness and accountability and this, in turn, leads to the erosion of government interventions to correct or counterbalance the ever-widening gap between the “haves” and the “have-nots” in America. Just as democratic progress fostered progressive tort reform, democratic decay over the last few decades has fostered regressive changes in the law of torts. Just as progressive tort reform in turn helped to consolidate democracy, the regressive tort reform movement has helped further entrench both economic and political inequality, and the further erosion of democracy.

Part II of this Article provides an introduction to the history of democracy and tort reform in the United States. Although the seeds of democracy and democratic tort reform were sown well before America’s founding, as this section demonstrates, neither began to blossom until after the Second World War. Post World War II Democratic progress both led to, and was consolidated by, progressive developments in tort law during the same period. Part III draws on recent literature in the field of political science detailing the extent of U.S. economic inequality, while Part IV draws on that literature to show how economic inequality is bound up with political inequality and the decay of American democracy. As Part V illustrates, interventions by the courts and legislators in the area of torts follows this pattern. This can be seen by the Supreme Court’s counter-democratic interventions, as well as the bulk of tort “reform” efforts since the 1980s.

II. THE HISTORY OF DEMOCRACY AND TORT REFORM IN AMERICA

For democracy to be meaningful, the people must have some degree of stake in their country’s future. Without a stake, there is little reason to participate or to contribute—if one wants buy-in, there needs to be something to buy-into. If people are going to lend their voices and hands to the future of America, they should have not only something to gain, but something to lose, should that project fail.

No one expects American democracy to be primarily direct, either in the sense of the people directly making decisions about how the U.S. is governed, or in the sense of getting direct results from one’s input. It is an accepted fact that most contributions are contributions to a process that must be mediated by institutions that one hopes are democratically representative and accountable. Further, the vote is only one mechanism for ensuring that officials represent the people. For democracy to operate between elections, the people not only need a voice, they need to reach the ears of those who govern.

The account of how American democracy has run off its tracks, presented in this Article, is not based on an elaborate or idealistic view of democracy. It is not based on shattering the illusion of direct democratic participation, on the dream of a truly deliberative democracy,³ or even of a republican democracy.⁴ The standard that is being proposed to measure or evaluate the health of American democracy is not the equal provision of conditions for human development and self actualization,⁵ nor even the ideal of equal concern and respect, although the U.S. is faltering on all these accounts.⁶ The critique that follows is based on the failure to achieve even the modest ambitions of representative democracy. The standard is based on the basic notions propounded by one of America's greatest Presidents and one of America's foremost democratic theorists, namely, that democracy consists of "government of the people, by the people, for the people"⁷ and that a "key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals."⁸ Democracy requires accountability and respect for the rule of law, and this entails equality before the law. It also requires transparency and access to accurate information, for without it, "the people" have no

³ The argument does not rely on a conception of democracy that is as rich as deliberative democracy, which requires not only that representatives represent the populace, but that they should have inclusive deliberations about the decisions they make and justify their decision with publicly acceptable reasons. AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3 (2004).

⁴ JÜRGEN HABERMAS, *Three Normative Models of Democracy*, DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 21 (Seyla Benhabib ed., 1996) (comparing liberal, republican, and deliberative forms of democracy).

⁵ MacPherson identifies the underlying moral value of democracy as "provid[ing] the conditions for the free development of human capacities, and to do this equally for all members of society." C.B. MACPHERSON, *THE REAL WORLD OF DEMOCRACY* 58 (1966).

⁶ Ronald Dworkin's view of our Constitution is "that it aims to create . . . a 'partnership' rather than a majoritarian form of democracy by insisting that all citizens are entitled to an equal role and voice in their self-government, that government at all levels must treat citizens with equal concern, and that government must leave individual citizens free to make the personal decisions for themselves that they cannot yield to others without compromising their self-respect." Ronald Dworkin, *Judge Roberts on Trial*, 52 NEW YORK REVIEW OF BOOKS 16 (2005) <http://www.nybooks.com/articles/18330#fnr6> (referring to his elaboration of this ideal in RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) and RONALD DWORKIN, *SOVEREIGN VIRTUE* (2000)).

⁷ Abraham Lincoln, 16th President of the United States of America (1861-65), The Gettysburg Address (Nov. 19, 1863). The U.S. State Department begins its discussion of the definition of "What is Democracy" with Lincoln's definition. U.S. DEPARTMENT OF STATE, *WHAT IS DEMOCRACY?* (1998), <http://usinfo.state.gov/products/pubs/whatsdem/whatdm2.htm>.

⁸ ROBERT DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971). Although the view of Democracy expounded by Dahl is not as rich or substantive as the requirements for political justice put forward by John Rawls, it is consistent with them. In fact, although it is not a sufficient condition for political justice, it is probably a necessary condition. See the discussion of Rawls's principles of justice, *infra* notes 48-54 and accompanying text. On Rawls' account and the account detailed below, economic inequality becomes problematic from the standpoint of capitalist democracy when it undermines political equality and fair equality of opportunity. *See id.*

chance of authentic participation or of holding representatives accountable. As detailed below, American democracy is failing, because its government is not of, or for the people; those who govern are not responsive to the people. This is true, both in the general and in the specific case of tort reform.

Although it is not uncommon to hear of references to the founding as a democratic founding,⁹ this is not an accurate depiction of American history. It took the United States nearly 200 years to achieve a level of political participation to justify the claim that it was a democracy. As C.B. MacPherson pointed out long ago:

In our Western societies the democratic franchise was not installed until after the liberal society and the liberal state were firmly established. Democracy came as a top dressing. It had to accommodate itself to the soil that had already been prepared by the operation of the competitive, individualist, market society, and by the operation of the liberal state, which served that society through a system of competing though not democratic political parties. It was the liberal state that was democratized, and in the process, democracy was liberalized.¹⁰

Democracy did not begin to take root in America until well into the 20th century, and it took until the 1960s for it to really begin to blossom. It is difficult to speak at all about American democracy prior to 1920, when women finally won the right to vote,¹¹ and as Alexander Keyssar notes, despite the much earlier formal emancipation of African-Americans, until the 1960s, most African-Americans could not vote in the South.¹² “As late as 1950s, basic political rights were denied [not only to those blacks in the South but] . . . to significant pockets of voters elsewhere, including the illiterate in New York, Native Americans in Utah, many Hispanics in Texas and California, and the recently mobile everywhere.”¹³

Tort reform since the 1980s has largely consisted of tort retrenchment back to the 1950s and before. The notion that the current wave of retrenchment

⁹ See, e.g. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835); Lance Banning, *Preface to LIBERTY AND ORDER: THE FIRST AMERICAN PARTY STRUGGLE* xiii, xiii (Lance Banning ed., 2004) (describing our revolution as the first democratic revolution). Even Jay Feinman refers to the United States at its founding as “the newly democratic” America. JAY M. FEINMAN, *UNMAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW* 56 (2004).

¹⁰ MACPHERSON, *supra* note 5, at 5.

¹¹ U.S. CONST. amend XIX. Note that twelve of the western territories along with New York extended the franchise to women before the Amendment. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 211-18 app. at 390 (2001) (Table A.20 States and Territories Fully Enfranchising Women Prior to the Nineteenth Amendment).

¹² KEYSSAR, *supra* note 11, at xvi.

¹³ *Id.* at 316. Universal suffrage is not a right enshrined in our Constitution.

is compatible with democracy may be based, in part, on the misconception that the founding was democratic¹⁴ and that the U.S. has been a democratic republic ever since. However, the classical liberal state was not democratic at its inception, and thus, it should not be surprising that the common law and tort law as they existed at the time of the founding were similarly not supportive of democracy.¹⁵ The common law system largely presumed equality and freedom, while exploiting the lack thereof. For example: limiting access to courts for the poor, allowing those with superior bargaining power to bind and keep the gains of unequal power through contract and tort law, and providing remedies that replicated status quo inequalities. It was not until the early 1900s that tort law started its modern trend towards the expansion of liability, a movement that did not fully take off until the 1960s.¹⁶

The 1960s and 1970s were decades of considerable progress in civil and political rights, as well as in socio-economic rights.¹⁷ These advances came from increased political participation,¹⁸ and from executive,¹⁹ legislative²⁰ and

¹⁴ As David C. Williams notes, the American Revolution was a conservative revolution; the revolutionaries claimed that they were defending the British Constitution from the British Crown and Parliament. David C. Williams, *The Constitutional Right to "Conservative" Revolution*, 32 HARV. C.R.-C.L. L. REV. 413, 414, 430-31 (1997). Although the U.S. eventually went somewhat further in creating republican legislatures and in protecting natural rights, rather than merely the customary rights of Englishmen, the bulk of U.S. constitutional structures and rights derived directly from British structures and rights. *Id.* at 431. See also JOHN REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF AMERICAN LIBERTY* (2005) (arguing that justifications for the American revolution were grounded in claims that Britain was violating the "Ancient Constitution" otherwise known as "the common law tradition," and that revolutionary calls were actually justified as restorative rather than revolutionary).

¹⁵ The lawyers who were largely responsible for articulating, developing and defending the English common law which the U.S. inherited (Coke, Seldon and Hale) were apposed to the absolutist theories of monarchical power as advocated by the Stuart Kings, but they also "accepted as natural monarchical government, a very limited franchise, and a patriarchal and profoundly inequalitarian social order that doled out privileges on the basis of status and sanctioned various forms of servitude." John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 532 (2005).

¹⁶ FEINMAN, *supra* note 9, at 53.

¹⁷ President Carter even signed the International Covenant on Economic, Social and Cultural Rights in 1977, although it was never ratified by Congress. See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2004), available at <http://www.unhchr.ch/pdf/report.pdf>.

¹⁸ Paul Allen Beck & M. Kent Jennings, *Political Periods and Political Participation*, 73 THE AM. POL. SCI. REV. 737 (1979); Thomas E. Cavanagh, *Changes in American Voter Turnout, 1964-1976*, 96 POL. SCI. Q. 53 (1981); Edward F. Cox, *Reinvigorating the FTC: The Nader Report and the Rise of Consumer Advocacy*, 72 ANTITRUST L.J. 899 (2005).

¹⁹ For instance, "The War on Poverty" introduced by Lyndon B. Johnson during his State of the Union address (Jan. 8, 1964), as well as proposed legislation that culminated in the Economic Opportunity Act and the Establishment of the Office of Economic Opportunity.

²⁰ See, e.g., The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963); Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 1, 78 Stat. 508 (1964); Civil Rights Act of 1964,

judicial developments.²¹ These were also the years in which American democracy was further consolidated through progressive reform of the common law, in general, and torts, in particular.²² It was not merely a coincidence that progressive tort reform tracked the coming of age of American democracy. It was made possible by the democratic gains of the 1960s and 1970s and helped consolidate and protect those gains.

Since the 1980s, those democratic gains have been eroding. As Keyssar states: "Although the formal right to vote is now nearly universal, few observers would characterize the United States as a vibrant democracy."²³ In 2004, the American Political Science Association warned that American democracy was in peril. They carried out this warning with the press release quoted at the beginning of this Article²⁴ and through a set of reports commissioned by the Association.²⁵ Those reports located the cause of this demise in the widening gap between the rich and poor. As its authors stated, "progress toward realizing [the] American ideals of democracy may have stalled, and in some arenas reversed[.]" due to the broadening gap in income and wealth in America.²⁶

Pub. L. No. 88-352, Title II, § 201, 78 Stat. 243 (1964); Social Security Act of 1965, Pub. L. No. 86-778, Title VII, § 701(a)-(e), 74 Stat. 992, 993 (1965); and The Age Discrimination Act of 1967 (ADEA), Pub. L. No. 90-202, § 2, 81 Stat. 602 (1967). Title VII of the Civil Rights Act of 1964 also created the Equal Employment Opportunity Commission (EEOC), Pub. L. No. 88-352, Title VII, § 701, 78 Stat. 253. The EEOC obtained enforcement authority under the Equal Opportunity Act of 1972; Pub. L. No. 92-318, Title IX, 86 Stat. 235 (1972) (Education Amendments prohibit sex discrimination in all aspects of education programs that receive federal money); The Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978).

²¹ For a list of landmark cases, see, e.g., Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1 app. 1 (2002).

²² See *infra* Part V.B. Although torts still reflected social inequalities, the reforms during the 1960s provided easier access to courts and better protection for consumers. As George Priest notes, "since 1960, our modern civil liability regime has experienced a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system." George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985). Constitutional torts also emerged during this period, with *Monroe v. Pape*, 365 U.S. 167 (1961) and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

²³ KEYSSAR, *supra* note 11, at 4, 322. For the view that our democracy is crumbling based on current obstacles to voting, see SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* (2006).

²⁴ Press Release, *supra* note 1.

²⁵ The task force compiled a series of reports in 2004: AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY; THREE CRITICAL ANALYSES ON ECONOMIC, GENDER, RACIAL, AND ETHNIC INEQUALITIES IN AMERICAN POLITICS; and a set of teaching materials. The American Political Science Association, Task Force on Inequality and American Democracy, http://www.apsanet.org/section_256.cfm (last visited Nov. 5, 2007). These materials were edited into a book. INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

²⁶ TASK FORCE ON INEQUALITY & AM. DEMOCRACY, AM. POL. SCI. ASS'N, AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY 1 (2004), <http://www.apsanet.org/imgtest/>

Arguably, the U.S. has had a number of constitutional revolutions since its founding.²⁷ Few, if any, would argue that these revolutions, past or present, have been as fundamental as the many democratic revolutions that took place around the world in the late 1980s and early 1990s.²⁸ Even fewer would consider the U.S. to be in the throes of a revolution or in the recent aftermath of such a revolution.²⁹ Yet, a number of commentators have characterized the culmination of changes brought about by the Rehnquist Court over the last two decades in these very terms.³⁰ Andrew Siegel recently noted that those commenting on the history of the Rehnquist Court are nearly uniform in their view that “Chief Justice Rehnquist and his allies on the Court instigated a judicial ‘revolution’ that has fundamentally altered both the substance of American law and the institutional arrangements through which we develop and enforce legal norms.”³¹

Properly speaking, these changes have been reactionary or counter-revolutionary and are routinely described in undemocratic terms. For instance,

taskforcereport.pdf. This is not to say that healthy levels of economic inequality are antithetical to democracy. As is argued below in section II however, certain levels and certain forms of economic inequality become problematic from the standpoint of democracy when they undermine either fair equality of opportunity or our civil and political liberties.

²⁷ According to Ackerman, the U.S. has gone through three historical ruptures or transitions brought about by heightened democratic participation resulting in “higher law making:” the extra legal Founding which did not follow the procedures set out in the articles of Confederation, the 13th and 14th Reconstruction amendments which bypassed the proper Article V procedures and the New Deal amendments, which took place largely through the pressure brought to bear on the courts to switch in time in order to save the nine Supreme Court justices from having to share the bench with a few more judges. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 42-44 (1991). Unlike these constitutional moments, the current revolution is not a democratic moment of higher law making.

²⁸ See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 206-09 (2002) (arguing that our founding revolution was conservative compared to many of the legal transitions that took place around the world in the 1990s).

²⁹ Perhaps the U.S. is now in a phase of consolidation. As Andrew Siegel puts it, “In rough cut, one might suggest that the years prior to 1994 represent rehearsal and experimentation with the agenda for the Rehnquist Revolution, the period from 1994 until 2002 or 2003, the years of the Revolution, and the years since then a period of consolidation or retrenchment.” Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1112 (2006).

³⁰ Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001). See also CHARLES J. OGLETREE, JR., *THE REHNQUIST REVOLUTION IN CRIMINAL PROCEDURE*, IN *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 55 (2002); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We The Court*, 115 HARV. L. REV. 4, 130 (2001); Sylvia A. Law, *In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 370 (2002) (critiquing the “federalism revolution”). Cf. Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L. J. 47, 49-52 (2003) (taking a “modest” view of the Court’s rulings); Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L. J. 363, 364 (2003) (remaining agnostic about the “revolution”).

³¹ Siegel, *supra* note 29, at 1100.

Jack Balkin and Sanford Levinson place the Court's contraction of congressional power at the core of this "constitutional revolution."³² Or, as Larry Kramer puts it:

The defining characteristic of [the Rehnquist Court] is . . . the Justices' conviction that they and they alone are responsible for the Constitution [A]ny notion that what the Constitution does or permits might best be left for the people to resolve using the ordinary devices available to express their will seems beyond the Rehnquist Court's compass.³³

The counter-revolution is undemocratic, both because of the usurpation of the power of Congress and of the people and because of the erosion of mechanisms developed over time to hold government accountable and to keep democracy on track. According to Sylvia Law, the Supreme Court has limited Congress's ability to address national problems to a degree only matched by the *Lochner* Court's interference with attempts by Congress and the President to respond to the Great Depression.³⁴ This includes: restricting the constitutional power of Congress to regulate interstate commerce and to enforce the guarantees of the Fourteenth Amendment; expanding state immunity from federally defined claims of unfair labor practices and discrimination; and "reject[ing] settled interpretations of federal civil rights laws to limit the protection that Congress has sought to give to the civil and economic rights of many vulnerable people, including older people, people with disabilities, women, and working people."³⁵

It may come as little surprise that this counter-revolution tracks the decline in American democracy. It may come as more of a surprise that both of these changes track the onslaught of regressive tort reform in the U.S.³⁶ Part V addresses the supporting role the Supreme Court has played in the regressive tort reform movement. This is not to say that the Supreme Court has played a leading role in this movement, but the mere fact that the Supreme Court is involved at all is notable. It is testament to the reality that the present counter-democratic changes taking place are not merely economic, political, or limited to broad public law areas like federalism. Rather, these changes are pervasive, cutting across the public and private law domains.

³² Balkin & Levinson, *supra* note 30, at 1045 (noting the revolution and criticizing the bare majority of the Court which has systematically reappraised the doctrines of federalism, racial equality, and civil rights, and who also gave the presidency to George W. Bush).

³³ Kramer, *supra* note 30, at 158.

³⁴ Law, *supra* note 30, at 371.

³⁵ *Id.* at 371-72.

³⁶ As Goldberg points out, arguing that that private law is integrally connected to public law runs against the grain of academic wisdom. Goldberg, *supra* note 15, at 530.

There is very little written in the legal academic literature connecting tort reform to constitutional change,³⁷ much less democratic change,³⁸ although some have been arguing for years that tort law reflects and further entrenches the inequalities that exist in the U.S.,³⁹ and numerous writers have noted that the recent wave of tort “reform” has been a product of powerful corporate interest groups and a campaign of disinformation.⁴⁰ If these commentators are correct,

³⁷ But see JoEllen Lind, “Procedural Swift”: *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 719 (2004) (arguing that federal legislation moving class actions into federal courts poses risks to the role of states in promoting the democratic values of political participation, transparency, and accountability); Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 556 (1999) (arguing that in the arena of tort reform “that courts tend to be populist and deliberative, whereas legislatures tend to be captured by special interests, secretive, hasty, and unwilling or unable to offer reasons for their actions”); Goldberg, *supra* note 15 (arguing for a Constitutional Right to an adequate legal scheme for the redress of wrongs); George L. Priest, *The Constitutionality of State Tort Reform Legislation and Lochner*, 31 SETON HALL L. REV. 683, 683 (2001).

There are many articles written on the subject of constitutional torts. See, e.g., Thomas A. Eaton, *Symposium: Re-examining First Principles: Deterrence and Corrective Justice in Constitutional Torts*, 35 GA. L. REV. 837 (2001). For the relationship between state constitutions and tort law, see John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159 (2005).

³⁸ Michael L. Rustad and Thomas H. Koenig come very close to linking democracy and tort reform when they label the period from 1945 to 1980 “the Democratic Expansionary Era.” Rustad & Koenig, *supra* note 21, at 4. Although the facts perhaps speak for themselves, Rustad and Koenig do not explain why the period from 1945 to 1980 is an era of democratic expansion and they do not argue that the current era is a period of democratic contraction. Nockleby & Curreri note that the first wave of tort neo-liberal tort reform began in the 1970s. Nockleby & Curreri, *supra* note 1, at 1030-31. Jay Feinman also comes close to connecting the “un-making” of the common law to democratic decay. FEINMAN, *supra* note 9. While Feinman places the blame on “radical conservatives,” “the right” and/or “Republicans,” the problem of unresponsiveness cuts across party lines. For examples of regressive legislation (including tort reform) and policies during the Clinton presidency, see *infra* notes 68, 78, and 218.

³⁹ The most prominent example is Richard L. Abel. See, e.g., Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987); Richard Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC’Y 199-231 (1981) Reprinted in CRITICAL LEGAL STUDIES (Allan Hutchinson ed., Rowman & Littlefield, 1989); Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253 (2006). See also Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (arguing that deep biases in tort law result in higher damage awards for white men than for women and minorities).

⁴⁰ See, e.g., Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1300 (2005) (“The story of the punitive damages recoil is a familiar one about special legislation to help corporate America.”). Rustad also points to Jerry J. Phillips, *Comments on the Report of the Governor’s Commission on Tort and Liability Insurance Reform*, 53 TENN. L. REV. 679, 680 (1986) (punitive damages reform is about special legislation for corporate America) and John W. Wade, *Strict Products Liability: A Look at its Evolution*, THE BRIEF, 1989, at 8, 56 (tort reform should be unconstitutional because it is special interest legislation). See also Siegel, *supra* note 29, at 1147 (noting the substantial energies and resources spent by American businesses in their fight for constitutional protection against punitive damages). See also Abel, *supra* note 37; FEINMAN, *supra* note 9. For the view that the tort reform campaign is based on misinformation, see F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L.

that the success of the regressive tort reform movement can be credited to political influence, power lobbying and “a campaign of misinformation [that] convinces people that reducing their rights is actually in their own interest,”⁴¹ then there is little room for question that the process behind this wave of tort reform is undemocratic. As the argument in Parts III and IV shows, regressive tort reform is a predictable outcome of the state of American democracy, even without the “campaign of misinformation.” Nonetheless, this campaign of misinformation further erodes the democratic values of transparency and accountability, making it harder for truly democratic reforms to gain traction. It further distorts the already muted voices of the majority of Americans on this issue.

To argue that the democratic gains of the 1960s and 1970s have come undone may sound slightly radical.⁴² It may not jibe with the average law review reader’s view of reality. The idea that the United States is “the model” of democracy for the world is well entrenched in the American psyche. The fact that the U.S. has a written Constitution that has been around the longest, often leads to the incorrect assumption that this country was one of the first to establish democracy.⁴³ However, American democracy is very young, and the majority of Americans have neither a stake, nor a voice, in the political system.⁴⁴

It is not expected that this proposition be taken on faith, and thus, the remainder of this Article puts forth evidence detailing how large the gap is between the “haves” and the “have-nots” in the U.S. political and economic system, as well as how the rising inequality gap is bound up with losses in socioeconomic and political stake, political voice, and losses in political responsiveness and accountability.⁴⁵ The spiraling downward pressure of both socio-

REV. 437, 529-31 (2007) (describing the “tort reform” movement as using a political model of truth rather than a rational model of truth, i.e. truth is about “truthiness” in the Stephen Colbert sense of the term (see further *infra* section V)); Abel, *supra* note 37; FEINMAN, *supra* note 9, at 48, 190-92; and Rustad & Koenig, *supra* note 21. See also WILLIAM HALTOM & MICHAEL MCANN, DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS (2004); THOMAS BAKER, THE MEDICAL MALPRACTICE MYTH (2005) (deconstructing the myths surrounding the calls for medical malpractice reform). For misinformation concerning punitive damages, see Eisenberg, *infra* note 294. See also *infra* section V.

⁴¹ *Id.* at 19. See also Lind, *supra* note 37, at 719; Abel, *supra* note 37, at 556; Goldberg, *supra* note 15; Priest, *supra* note 37, at 683; Eaton, *supra* note 37; Witt, *supra* note 37. See also *infra* notes 178-182 and accompanying text for further discussion of this phenomenon.

⁴² The argument that follows does not depend on any “radical” or socialist view of the state or democracy. The point is not “put down” the ailing “golden goose” out of envy because others have more, but to nurture the goose back to life by reinvigorating the principles that sustain her.

⁴³ Thirteen countries extended the franchise to women before the United States. Grolier Multimedia Encyclopedia, <http://ap.grolier.com/article?assetid=02796700&templatename=/article/article.html> (last visited Nov. 5, 2007).

⁴⁴ It may be particularly difficult for law professors to imagine that they have little voice in American politics (see *infra* Part III below on the impact of academics on political responsiveness).

⁴⁵ In spite of the fact that surveys are biased against those with egalitarian views, Schlozman et al.’s survey results revealed substantial pro-egalitarian sentiments. KAY L. SCHLOZMAN ET AL.,

economic and political inequality has resulted in unresponsive legislation and policies, including tort reform, that is contrary to the needs and interests of the majority of Americans. Unlike the tort reform that helped consolidate American democracy in the 1960s and 1970s, the tort reform of the last two decades has acted to further entrench and consolidate oligarchy, if not plutocracy. This Article draws on contrasting trends in Europe to illustrate and support these points.

III. ECONOMIC INEQUALITY: THE EROSION OF CAPITALIST DEMOCRACY'S FOUNDATION

A. *Introduction*

Few, if any, in America or elsewhere are arguing for communist-style economic equality.⁴⁶ There is little to no support for the view that, at the end of the day, Americans should all have an equal income or equal wealth, no matter how talented, hardworking or even lucky one may be.⁴⁷ Nonetheless, economic inequality becomes problematic from the standpoint of democracy, both when it reaches a point where it seriously undermines political equality, and when it undermines fair equality of opportunity in the market.

The principle of political equality is enshrined in John Rawls's first principle of justice, which requires that "[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."⁴⁸ As he states in his later work: "The fair value of the political liberties ensures that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social

TASK FORCE ON INEQUALITY & AM. DEMOCRACY, *INEQUALITIES OF POLITICAL VOICE* 12-13 (2004), <http://www.apsanet.org/imgtest/voicememo.pdf>. Those pro-egalitarian sentiments are much stronger when it comes to the preferences of Americans for political equality than for economic quality. *Id.* at 11, 17.

⁴⁶ Ronald Dworkin makes this point in *SOVEREIGN VIRTUE* 2 (2000).

⁴⁷ Ronald Dworkin would subject all choice-independent, luck-based economic inequality to redistribution, including the luck of having or not having talent. *Id.* at 90-91, 287. Dworkin sees this as following from the principle of equal resources, which, in turn, follows from his principle that governments should show equal concern for the fate of each of its citizens. *Id.* at 1, 65-119. For Dworkin, equal concern is the sovereign virtue of political community. *Id.* at 1.

⁴⁸ JOHN RAWLS, *A THEORY OF JUSTICE* 302 (1971). The point of Rawls's theory of justice, justice as fairness, is to provide a moral and philosophical basis for democratic institutions. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 5 (2001). Rawls does believe that his two principles of justice can be realized under either a property owning democracy or a liberal socialist regime, but not under a laissez-faire capitalist regime. *Id.* at 137-38. Ronald Dworkin shares this view. Ronald Dworkin, *Liberalism*, in *LIBERALISM AND ITS CRITICS* (Michael J. Sandel ed., 1984) (arguing for a social democratic form of liberalism). For Dworkin, the demands of equality require either "redistributive capitalism or limited socialism—not in order to compromise the antagonistic ideal of efficiency and equality, but to achieve the best practical realization of the demands of equality itself." *Id.* at 69.

class.”⁴⁹ For Rawls, equal citizenship is incompatible with allowing any trade-offs between economic inequality and one’s liberties.⁵⁰ While his second principle of justice allows for economic inequality,⁵¹ his first principle does not allow for political inequality. Americans tend to share this view, in that they show overwhelming support for political equality⁵² and are more comfortable with economic inequality than political inequality.⁵³

The goal, dream or myth of equal opportunity in a “land of opportunity,” is a fundamental principle which undergirds our capitalist system.⁵⁴ The idea is that people should have a fair, if not equal, chance of achieving more. It is why movies like *Rocky* are so popular. People accept a certain level of economic inequality, based on the idea that those with less can have more, if they have talent and if they put that talent to use in the market. Income or wealth mobility based on fair equality of opportunity may even be counted as a fundamental principle of our capitalist democracy. This principle draws its appeal both from an idea of fairness or just deserts, as well as from an idea of efficiency. In other words, both the idea of getting out of the economic system in proportion to what one puts in, and the idea that there will be more for everyone, supports the principle of fair equality of opportunity. The later notion is based on the assumption that people will contribute more if their input into the system results in fair output from the system.

It does not follow that the market provides fair equality of opportunity. The capitalist market is not like a game of chess, an Olympic competition, or even championship boxing where one wins a ribbon, gold medal or belt, and the loser goes home to practice in the hopes of taking the ribbon, gold medal or belt the next time. Left to its own, the market does not allow for comebacks on a level playing field. It does not allow Ali, much less Rocky, to win the belt one more time, just because he has the talent and energy to do it. It does not allow this because the market does not merely dole out awards and prizes for those who win; it doles out money and other tools for winning the next round of com-

⁴⁹ RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 48, at 46.

⁵⁰ John Rawls, *Kantian Constructivism in Moral Theory (the Dewey Lectures 1980): Rational and Full Autonomy*, 77 J. PHIL. 515, 545 (1980). As Wolff points out, the priority of liberty articulates Rawls’s conviction that mutual respect of equal citizenship expresses men’s recognition of one another’s moral personality and that “to bargain away a portion of one’s liberties for a softer life would, in Rawls’s view, be to sell one’s birthright as a human being for a mess of potage.” ROBERT P. WOLFF, UNDERSTANDING RAWLS: A RECONSTRUCTION AND CRITIQUE OF A THEORY OF JUSTICE 88 (1977). This is one way of embodying in his theory the Kantian injunction to “treat humanity, whether in oneself or others, always as an end and never merely as a means.” *Id.*

⁵¹ RAWLS, A THEORY OF JUSTICE, *supra* note 48, at 302. Rawls’s second principle of justice requires that social and economic inequalities be arranged so that they are “attached to offices and positions open to all under conditions of fair equality of opportunity.” *Id.* at 303.

⁵² SCHLOZMAN ET AL., *supra* note 45, at 11, 15.

⁵³ *Id.* at 11, 17.

⁵⁴ What John Rawls calls fair equality of opportunity. RAWLS, A THEORY OF JUSTICE, *supra* note 48, at 302-03.

petition. It is more akin to each round of chess or checkers, where it becomes harder and harder to win, the less pieces one has. It is like those games in which the more points one scores, the more weapons and ammunition one can pick up, thus making it easier to score. As disheartening as it is to lose round after round to the bitter end, the game needs to end, and in order to entice one back to the game, the playing field needs to be rebalanced. Few, if anyone, would be willing to start the checkers game or the boxing match where he or she left off, much less where one's parents left off. People want a fair chance to win the next game. If it is desirable for people to contribute, then inequalities produced by the market should be harnessed and re-directed to make it worth participating in the market. For instance, the fact that one's parents were relative losers cannot be allowed to doom one's children to being losers, and thus, certain levels of health, education and general welfare are crucial for giving the "losers" what they need to get back in the game, to give them what they need to contribute and compete once again.

The remainder of this section details the extent of economic inequality in America, as compared to other economically advanced democracies in terms of income, wealth and mobility. It details both how unequal the U.S. is as a result of the market and how little the U.S. government does to rebalance the inequalities generated by the market. The impact of these economic equalities on political equality is traced in Part IV below.

B. *Income inequality*

For a short time, the impact of Hurricane Katrina on the people of New Orleans brought American inequality into sharp relief. As one commentator wrote, "Katrina's whirlwind has laid bare the fault lines of race and class in America. For a lightning moment, the American psyche was singed."⁵⁵ There appeared to be some hope that "the shock and shame" of Katrina might "strip away the old evasions, hypocrisies and not-so-benign neglect" surrounding issues of inequality in America.⁵⁶ The overwhelming racial dimension to the impact of the hurricane no doubt further accentuated the contrast between the "haves" and the majority of African-American "have-nots." These socio-economic inequalities gave rise to fears of gross political inequality, as significant worries of disenfranchisement abounded in the lead up to the first city elec-

⁵⁵ Johnathan Tilove, *"Our Society is so Uneven": Katrina Exposes Inequalities of Race, Wealth*, TRENTON TIMES, Sept. 4, 2005, at B1.

⁵⁶ Jonathan Alter, *The Other America*, NEWSWEEK, Sept. 19, 2005, at 42-48; Larry Bartels, *Is the Water Rising? Reflections on Inequality and American Democracy*, 39 PS: POL. SCI. & POL. 39, 39 (2006) [hereinafter Bartels, *Water Rising*]. "Many Americans were shocked and shamed by the televised images of New Orleans in the wake of Hurricane Katrina Thousands of residents, mostly Black and poor, seemed to be trapped in a Hobbesian state of nature, abandoned by government and civilized society."

tions since the hurricane, given the large numbers of poor African-Americans that were resettled outside the city.⁵⁷

However inconvenient it might be, gross inequality is not limited to New Orleans and other areas of drastic natural disasters. Inequality is pervasive in this country. As Appendix Table 1 illustrates, the statistics on inequality show that among rich western nations, the U.S. has the highest level of inequality by far.⁵⁸ The U.S. has the largest gap between the bottom 10% of the population and the top 10% of the population as their income relates to the median income (the decile ratio gap).⁵⁹ The U.S. also has the greatest degree of inequality when measured against all income distributions (the Gini coefficient gap),⁶⁰ and the lowest 10% is significantly worse off than their European counterparts.⁶¹ Since WWII, this gap has widened at a pace and to a degree unmatched by other economically advanced countries.⁶²

Converting these numbers to a standard grade curve, such as the bell or C curve commonly used in first year undergraduate courses, might bring them into perspective. For the U.S., both the decile ratio of 5.38 and its Gini coefficient of .369 are over 2 standard deviations away from the average. This puts both scores in the F range of a C curve. While the next worst group of performing countries (i.e. Spain, Ireland, the U.K. and Italy) is in the C- to D- range, the U.S. is alone in the F range of the curve.

⁵⁷ See, e.g., Marc Morano, *Voter Disenfranchisement Predicted in New Orleans*, CNSNEWS.COM, Mar. 9, 2006, <http://www.cnsnews.com/ViewPolitics.asp?Page=%5CPolitics%5Carchive%5C200603%5CPOL20060309a.html>; Jesse Jackson, *Secret rolls undermine N. Orleans vote*, CHI. SUN-TIMES, Mar. 7, 2006, available at http://www.findarticles.com/p/articles/mi_qn4155/is_20060307/ai_n16177797.

⁵⁸ Andrea Brandolini & Timothy M. Smeeding, *Patterns of Economic Inequality in Western Democracies: Some Facts on Level and Trends*, 39 PS: POL. SCI. & POL. 21, 23 (2006); See also *id.* at 22 fig.1.

⁵⁹ *Id.* The population in the bottom 10% income group receives only 39% of the median income, while the top 10% receive 210% of the median income. This results in a decile ratio in which the top 10% income group receives 5.45 times what the bottom group receives.

⁶⁰ *Id.* at 22 (0 being perfectly equal and a 1 or 100% being perfectly unequal). The U.S. CIA Fact Book put the U.S. at 45% for 2004 with a 2004 estimate of 12% of the population below the poverty line. CIA, *THE WORLD FACTBOOK*, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html#Econ> (last visited Nov. 5, 2007). To explain further, perfect equality means everyone has the same income (0) while perfect inequality means that one person has everything and the rest have nothing (1).

⁶¹ Brandolini & Smeeding, *supra* note 58, at 22 fig.1, available at <http://www.lisproject.org/keyfigures>.

⁶² Lawrence Jacobs & Theda Skocpol, *Restoring the Tradition of Rigor and Relevance to Political Science*, 39 PS: POL. SCI. & POL. 27 (2006) (referring to L. MISHEL ET. AL, *THE STATE OF WORKING AMERICA* (2005)). See also Brandolini & Smeeding, *supra* note 58, at 25 figs. 3 & 4. Jacobs and Skocpol report that, as of 2003, the most affluent fifth of the population received 47.6% of family income while the top 5% received 21% of that income. Jacobs & Skocpol, eds., *INEQUALITY*, *supra* note 25.

C. *Post redistribution inequality*

Inequality in America is not merely due to market-based inequalities, but also due to a lack of government intervention to mitigate the inequalities generated by the market.⁶³ As Appendix Table 2 shows, if one only looks at the inequality produced by the market, the U.S. is not much worse than many of these thirteen advanced capitalist states, and, in fact, Americans are more equal than the United Kingdom and France. However, market interventions by way of taxes and benefits significantly dampen the disparity between the rich and the poor in most of these countries. These inequalities are reduced by 47% in France and over 30% in the U.K., while the U.S. government only dampens these inequalities by 22%. While the average reduction in inequality is over 30%, the reduction in the U.S. is about 20%.

Further, the data on Gini coefficient reduction through taxes and benefits does not include pensions or the public provision of education or health care, even though the low or no cost provision of these benefits greatly reduces inequalities in what one can afford to consume.⁶⁴ Because educational provisions in most states in the U.S. are still based on local property values, the distribution of this service entrenches and exacerbates the above inequalities within the U.S. No other country finances education in this way.⁶⁵ There is also a significant gap in the provision of health care between the U.S. and the other Organization for Economic Co-operation and Development (O.E.C.D.) countries, which significantly exacerbates the disposable income gap.⁶⁶ This has a significant impact on those who are uninsured or under-insured.⁶⁷ Between 1973 and

⁶³ Lane Kenworthy & Jonas Pontusson, *Rising Inequality and the Politics of Redistribution in Affluent Countries*, 3 PERSPECTIVES ON POL. 449 (2005), available at <http://www.u.arizona.edu/~lkenwor/pop2005.pdf>. This data does not reflect government spending on infrastructure, the military, or the civil and criminal justice system, which provide a disproportionate benefit to businesses and the wealthy.

⁶⁴ *Id.* at 455.

⁶⁵ Allan Odden & William H. Clune, *School Finance Systems: Aging Structures in Need of Renovation*, 20 EDUC. EVALUATION & POL'Y ANALYSIS 157, 168-69 (1998). For the intersection of law, race and education, see Samuel R. Lucas Paret & Marcel Paret, *Annual Reviews*, 1 ANN. REV. L. & SOC. SCI. 203 (2005), available at <http://arjournals.annualreviews.org/eprint/znK7y9nbHQND7hyTuGfb/full/10.1146/annurev.lawsocsci.1.041604.115931?cookieSet=1>. For facts on educational attainment by race, see KAISER FAMILY FOUNDATION, KAISER FAMILY FOUNDATION FACT SHEET: YOUNG AFRICAN AMERICAN MEN IN THE UNITED STATES (2006) [hereinafter KAISER FAMILY FOUNDATION, FACT SHEET], <http://www.kff.org/minorityhealth/upload/7541.pdf>.

⁶⁶ Although Americans spend twice as much for health care than most O.E.C.D. countries, most of the burden is born by the private sector. While the average O.E.C.D. country public expenditure on health as a percentage of total spending on health has consistently been over 70% (1980-2005), the United States has averaged between 40% and 45% from 1980 to 2005. See OECD Health Data 2006—Frequently Requested Data: Data on Public Expenditure on Health (2006), <http://www.oecd.org/dataoecd/59/49/35529832.xls>.

2000, the income of the bottom 90% of U.S. tax payers fell by 7%, while the income of the top 1% grew by 14%.⁶⁸

D. Wealth inequality

The bottom line of inequality is not so much how much income one has, but how much wealth one has at the end of the day, in terms of all one's physical and financial assets minus one's liabilities. Unfortunately, the situation is significantly worse if one looks at inequality in wealth, rather than merely inequality in income. The U.S. Gini coefficient based on wealth is a staggering .801.⁶⁹ This is worse than the Gini value that would be generated in a ten-person group, consisting of two people worth \$1 million each, while everyone else's combined net worth was \$8,000 (\$1,000 each).⁷⁰ The curve here is compressed compared to the income inequality curve. There are no As and there are no Fs, but the U.S. does sit alone with Switzerland in the solid D range.

E. Lack of mobility

At this point in time in America, about 50% of the differences in wealth in one's parents' generation show up in the present generation.⁷¹ Contrary to

⁶⁷ For information on the uninsured, see KAISER FAMILY FOUNDATION, THE GROWING UNINSURED POPULATION AND THE HEALTH CARE SAFETY NET [hereinafter KAISER FAMILY FOUNDATION, GROWING], <http://www.kff.org/uninsured/profile.cfm>. For statistics on provision of health care by race, see KAISER FAMILY FOUNDATION, FACT SHEET, *supra* note 65. Insurance coverage may have a significant impact on law suits. As Reisman states, "where consumers are heavily insured but manufacturers and sellers go bare, there will be fewer product liability actions than in a jurisdiction where victims have little coverage but businesses hold large policies." Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 827 (2003). See also Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 TEX. INT'L L.J. 45, 47 (1999) ("the [British] National Health Service has in the past operated to relieve most tortfeasors from the costs of their victims' medical treatment.").

⁶⁸ Heather Boushey & Christian E. Weller, *Inequality and Household Economic Hardship* 5 (United Nations Dep't of Econ. & Soc. Affairs, Working Paper No. 18, April 2006).

⁶⁹ JAMES B. DAVIES ET AL., THE WORLD DISTRIBUTION OF HOUSEHOLD WEALTH 26 (2006), <http://www.wider.unu.edu/research/2006-2007/2006-2007-1/wider-wdhw-launch-5-12-2006/wider-wdhw-report-5-12-2006.pdf>.

The wealth data here is household wealth as of the year 2000. As the authors of this report note, "[w]ealth data typically become available with a significant lag, and wealth surveys are conducted at intervals of three or more years. The year 2000 provides us with a reasonably recent date and good data availability." *Id.* at 3 n.4.

⁷⁰ The actual Gini coefficient generated by these numbers is .796. The same result would be generated by two members of the group having \$1,000 in wealth and eight having only \$1. For an accessible Gini calculator online see Free Statistics Software, Office for Research Development and Education, <http://www.wessa.net/co.wasp> (last visited Nov. 5, 2007).

⁷¹ Emily Beller & Michael Hout, *Intergenerational Social Mobility: The United States in Comparative Perspective* 16 THE FUTURE OF CHILDREN 19, 26-27 (2006) (This entire issue, pub-

what the majority of Americans believe, their chances of moving up the economic ladder are not as good as they were 30 years ago.⁷² For instance, sons in the bottom three-fourths of the socio-economic scale in the 1990s had a lower chance of moving up than sons in the 1960s.⁷³ Even more troubling is that household income inequality increased, while those working within the household also increased.⁷⁴ Without the contribution of wives, the income of the bottom fifth would have decreased by 13.9% between 1979 and 2000, rather than rising by 7.5%.⁷⁵ Although the U.S. has achieved an average performance in occupational mobility, as compared to other “open” societies or countries that espouse the idea of equality of opportunity, it performs rather poorly when it comes to actual income mobility.⁷⁶ The United States has high income inequality, coupled with low income mobility, whereas the Scandinavians have high income mobility and low income inequality.⁷⁷ If American democracy is measured, in part, by the principle of fair equality of opportunity or by how well it approximates the ideal embodied in the title, “the land of opportunity,” it is falling well below the mark.

lished by The Brookings Institute and Woodrow Wilson School of Public and International Affairs at Princeton, is dedicated to Opportunity in America (1-196)). The figure is 40% for inter-generational income inequality. *Id.* at 25-26.

⁷² See e.g., Janny Scott & David Leonhardt, *Class Matters: Shadowy Lines that Still Divide*, N.Y. TIMES, May 15, 2005, <http://www.nytimes.com/2005/05/15/national/class/OVERVIEW-FINAL.html?ex=1273809600&en=2fb756e388191419&ei=5088&partner=rssnyt&emc=rss>. The New York Times poll indicated that over 75% of Americans thought that the chances of moving up the economic ladder were as good or better than they were 30 years ago. Interactive Graphic, How Class Works, http://www.nytimes.com/packages/html/national/20050515_CLASS_GRAPHIC/index_01.html (last visited Nov. 5, 2007).

⁷³ Boushey & Weller, *supra* note 68, at 6 (citing Earl Wysong, Robert Perrucci, & David Wright, *Organizations, Resources, and Class Analysis: The Distributional Model and the U.S. Class Structure* (Ind. U., Working Paper, 2004) (comparing the incomes and occupations of 2,749 fathers and sons from the 1970s to the late 1990s)). See also Beller & Hout, *supra* note 71, at 19, 27.

⁷⁴ Boushey & Weller, *supra* note 68, at 6.

⁷⁵ *Id.* The top fifth of incomes was not as heavily impacted by women entering the job market as was the bottom. Wives in families with children in the bottom fifth increased their working hours by 43.9% as compared to only a 27.4% increase in working hours among wives in the top fifth. *Id.*

⁷⁶ Beller & Hout, *supra* note 71, at 30.

⁷⁷ *Id.* Note that this is likely a result of how poorly the children in the United States fare in comparison with other rich countries. The U.S. ranks 20 out of 21 countries when it comes to the well-being of its children (with only the U.K. performing worse in this regard). INNOCENTI RESEARCH CENTRE, UNICEF, CHILD POVERTY IN PERSPECTIVE: AN OVERVIEW OF CHILD WELL-BEING IN RICH COUNTRIES 2 (2007), available at <http://www.unicef-icdc.org/publications/> (this ranking is a combined ranking based on: material well-being, family and peer relationships, health and safety, behavior risks, and both educational well-being and subjective well-being). The four Scandinavian countries are in the top 7 of this ranking, i.e. Sweden is at number 2, Denmark at 3, Finland at 4, and Norway at 7. *Id.* See also Table 5 *infra* p. 709.

IV. POLITICAL INEQUALITY: UNDERMINING DEMOCRACY AND FURTHER ENTRENCHING ECONOMIC INEQUALITY

As early as 1955, Simon Kuznets described the relationship between inequality and economic development in democratic terms. In *Economic Growth and Income Inequality*, he stated:

[I]n democratic societies the growing political power of the urban lower-income groups led to a variety of protective and supporting legislation, much of it aimed to counteract the worst effects of rapid industrialization and urbanization and to support the claims of the broad masses for more adequate shares of the growing income of the country.⁷⁸

However, in recent years, lower-income groups have failed to secure such “protective and supporting legislation,” and the legislation that is on the books has been scaled back and under-enforced,⁷⁹ leaving the poor and lower-income groups to the vicissitudes of the market. For instance, Bill Clinton’s Welfare Reform of 1996 removed many important features of the U.S. welfare safety net.⁸⁰ If Kuznets is correct, something has gone wrong with American democracy, or at least with the ability of lower-income groups to use political pressure to have their needs addressed in the U.S.⁸¹

The impact of the gap between the “haves” and “have-nots” on democracy is explored in detail in the American Political Science Association Task Force Reports on Inequality and American Democracy.⁸² In describing the results of the report, two of its authors stated:

[The report concluded that the] privileged participate more than others and are increasingly well organized to press their de-

⁷⁸ Simon Kuznets, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1, 17 (1955).

⁷⁹ One example that resonates with tort reform is the E.E.O.C. See, e.g., Marni Goldberg, *Job-Discrimination Claims Pile Up With Budget Cuts*, CHI. TRIBUNE, June 17, 2006 (The claims backlog at the EEOC, which has lost 20% of its staff since 2001, grew 12% last year, resulting in a backlog of over 33,000 claims; the backlog is expected to grow to 48,000 by 2007 while Bush is proposing another 4 million dollar reduction in funding).

⁸⁰ See JACOB HACKER ET AL., TASK FORCE ON INEQUALITY AND AMERICAN DEMOCRACY, INEQUALITY AND PUBLIC POLICY 14 (2004), <http://www.apsanet.org/imgtest/feedbackmemo.pdf>. As Thomas Piketty and Emmanuel Saez note in *Income Inequality in the United States, 1913-1998*, CXVIII THE Q. J. OF ECON. 1, 1-2 (2003), “the Kuznets curve is widely held to have doubled back on itself, especially in the United States, with the period of falling inequality observed during the first half of the twentieth century being succeeded by a very sharp reversal of the trend since the 1970s.”

⁸¹ Or, the U.S. is in a new industrial revolution (i.e. the computer revolution). See Piketty & Saez, *supra* note 80, at 2, 24.

⁸² TASK FORCE REPORTS, *supra* note 25.

mands on government. Public officials, in turn, are much more responsive to the privileged than to average citizens and the least affluent. Citizens with lower or moderate incomes speak with a whisper that is lost on the ears of inattentive government officials, while the advantaged roar with a clarity and consistency that policy-makers readily hear and routinely follow.⁸³

This undermines the principle of political equality, or what Rawls calls the fair value of the political liberties (see above), by allowing socio-economic disadvantage to translate into political disadvantage and the erosion of the fair value of one's political liberties.

According to some studies, the poorest one-third of Americans have virtually no influence on national legislation and the bottom two-thirds have less than half the influence of the top one-third.⁸⁴ Larry Bartels, another member of the Task Force, summarized his unpublished findings from the 101st Congress of 1989 to the 103rd Congress of 1994, which showed that, while there was a good deal of responsiveness to middle- and high-income constituents, senators completely ignored constituents in the bottom third economic bracket.⁸⁵ The figures are stark, with nearly twice as much responsiveness shown to high-income constituents than for middle-income constituents and absolutely no weight given to the lower one-third of the population.⁸⁶ One may have expected that this would hold true for Republican members of Congress, given the stereotype that Republicans are for the rich, while Democrats are for the poor.⁸⁷ Bartels's statistics do, in fact, show that Republicans are nearly twice as responsive to the views of wealthy constituents as Democrats.⁸⁸ While one might expect that Democrats would spread their responsiveness between middle- and lower-income constituents, they, in fact, split their responsiveness nearly 50/50

⁸³ Jacobs & Skocpol, *INEQUALITY*, *supra* note 25, at 27. See also Kay Lehman Schlozman, *On Inequality and Political Voice: Response to Stephen Earl Bennett's Critique*, 39 PS: POL. SCI. & POL. 55, 56 (2006) (referring to SCHLOZMAN ET. AL., *supra* note 45, at 30-33).

⁸⁴ Bartels, *Water Rising*, *supra* note 56, at 40. See also Stephen Macedo & Christopher Karpowitz, *The Local Roots of Inequality*, 39 PS: POL. SCI. AND POL. 59, 60 (2006); Larry M. Bartels, *Economic Inequality and Political Representation* (2005) [hereinafter Bartels, *Economic*] (unpublished manuscript, on file with Princeton University), www.princeton.edu/~bartels/economic.pdf; Martin Gilens, *Public Opinion and Democratic Responsiveness: Who Gets What they Want from Government?* (2003) [hereinafter Gilens, *Public Opinion*] (unpublished manuscript, on file with Princeton University), <http://www.princeton.edu/~csdp/events/pdfs/Gilens.pdf>; Martin Gilens, discussing *Public Opinion and Democratic Responsiveness: Who Gets What they Want from Government?*, The Center for Study of Democratic Politics, Princeton University, conference on Global Inequality (Nov. 7-8, 2003).

⁸⁵ Bartels, *Water Rising*, *supra* note 56, at 40.

⁸⁶ See *id.* at 40 fig.1.

⁸⁷ Although there is some truth to the former assertion, Bartels's work shows that there is little truth to the latter assertion.

⁸⁸ Bartels, *Economic*, *supra* note 84, at 20-24, 44-46 tbls.4-6, 53 fig.3.

between middle- and high-income constituents and, like Republicans, are completely unresponsive to low-income constituents.⁸⁹ This view is supported by historians of voting law and practices and by former democratic cabinet members.⁹⁰ As Alexander Keyssar noted in his work on the history of voting in America, Democrats have spent more energy courting suburban swing votes and trying to keep Wall Street happy than trying to mobilize the masses of poor non-voters.⁹¹

Bartels also noted that the unpublished work of Martin Gilens supported his finding.⁹² Gilens has since published his expanded research, and the results are even more startling than Bartels's findings.⁹³ Although he found a moderately strong relationship between what the public wants and what the government does,⁹⁴ he also found that, when Americans with different income levels had differing policy preferences, the policy outcomes strongly reflected the preferences of the most affluent but not those of poor or even middle-income Americans.⁹⁵ Thus, Gilens's published work goes beyond questioning whether the democratic system works for the poor, to whether the system can be characterized as democratic at all.

Lawrence Jacobs and Benjamin Page found similar results when it came to U.S. foreign relations.⁹⁶ These authors tested the impact of four different factors on U.S. foreign policy: 1) public opinion, 2) labor, 3) business, and 4) members of epistemic communities (hereinafter experts).⁹⁷ The last factor consists of experts such as educators, leaders of private foreign policy organizations and think tanks. They used four different types of regression models and found that, under the four models, business was by far the most dominant influence on U.S. foreign policy (across the House, the Senate and the executive administra-

⁸⁹ The actual ratio is 54/46, thus, Democrats can boast that they are moderately more the party of the middle class than of the upper class. Bartels, *Economic*, *supra* note 84, at 53 fig.3.

⁹⁰ KEYSSAR, *supra* note 11, at 4, 321. Keyssar also refers to the work of Robert Reich, Clinton's secretary of labor (ROBERT B. REICH, *LOCKED IN THE CABINET* (1997)) noting that Reich's memoirs have a number of references to the fact that the Clinton administration's political strategies subordinated social policy to the preferences of Wall Street.

⁹¹ *Id.*

⁹² Bartels, *Water Rising*, *supra* note 56, at 40 (referring to Gilens, *Public Opinion*, *supra* note 84).

⁹³ Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. 778, 778-96 (2005) [hereinafter Gilens, *Inequality*]. He has almost doubled his data set from 754 to 2000 questions and expanded the years from 1992 to 1998 to between 1981 and 2002. *Id.* Note that these years substantially overlap with the Rehnquist Court and with the beginning of regressive tort reform.

⁹⁴ *Id.* at 786. Gilens notes, however, that even with proposed changes receiving 90% public support there is only a 46% chance the policy makers will adopt the policy. *Id.*

⁹⁵ *See id.* at 788-89.

⁹⁶ Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. 107 (2005).

⁹⁷ *Id.* at 110.

tion).⁹⁸ Public opinion had virtually no impact,⁹⁹ and the impact of experts was dubious.¹⁰⁰ It was unclear whether their opinions were causes or effects of the views of policy makers,¹⁰¹ and how much of their views were the result of the influence of business and labor.¹⁰² If the impact of business and labor on expert opinions is plugged into their analysis, then the impact of business on foreign policy raises from .52 to just over .70, while the impact of labor rises from .16 to about .29.¹⁰³ While labor has some impact, it is still dwarfed by the impact of business.

The results of this study bring into doubt the democratic responsiveness and accountability of the U.S. political system.¹⁰⁴ If public opinion has little to no influence on foreign policy, the real impact of experts is dubious, and business has two to three times the impact of labor, then one must question the true vitality of American democracy. Given the standards articulated above, these signs of non-responsiveness and grossly unequal responsiveness threaten democracy conceived in these terms.¹⁰⁵

Of course, it is difficult to be heard if one does not have a voice. Political voice is exercised through voting, spending or contributing, and actual contact with politicians. Social scientists have identified voter turnout as the potential cause of both the failure to alleviate the inequality gap¹⁰⁶ and the failure to respond to lower-income constituents.¹⁰⁷ Others have argued that affluence and actual contact with politicians, or the lack thereof, may be more significant in determining the responsiveness of politicians to different constituencies.¹⁰⁸

According to political economists, Kenworthy and Pontusson, the median-voter model predicts that, with increases in market inequality, the distance between median and mean income increases (the mean or average wage goes up more than the wage in the middle, or median wage); as a result, support for gov-

⁹⁸ *Id.* at 114-17.

⁹⁹ *Id.* at 114 tbl.1, 115 tbl.2, 116 tbls.3-4.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 117.

¹⁰² *Id.* at 119.

¹⁰³ *Id.*; see *id.* at 120 tbl.5. For a treatment of this phenomenon in the context of tort reform, see FEINMAN, *supra* note 9, at 175.

¹⁰⁴ Jacobs & Page, *supra* note 95. The authors note that their findings “have some troubling normative implications.” These normative implications apply to “adherents to democratic theory who advocate substantial government responsiveness to the reasoned preferences of citizens.” *Id.* at 121 (referring to such adherents as ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* (1989) and BENJAMIN PAGE & ROBERT SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICA’S POLICY PREFERENCES* (1992)).

¹⁰⁵ Bartels, *Water Rising*, *supra* note 56, at 39.

¹⁰⁶ Kenworthy & Pontusson, *supra* note 63, at 456-61, 459 (emphasis added), 462 fig.9. This is the contemporary variant of Kuznets’ work cited above. Kuznets, *supra* note 78.

¹⁰⁷ John Griffin & Brian Newman, *Are Voters Better Represented*, 67 J. POL. 1206 (2005).

¹⁰⁸ Bartels, *Economic*, *supra* note 84, at 26-27.

ernment spending increases, and thus, the inequality gap is narrowed.¹⁰⁹ As documented above, while the model works in Europe, it has failed in the United States. How does one account for the failure? One viable explanation for Europe's success, and the United State's failure to close the gap, is voter turnout. In the countries surveyed by Kenworthy and Pontusson, the differences in responsiveness to inequalities roughly track voter turnout rates.¹¹⁰ In other words, the higher the voter turnout, the more redistribution from rich to poor.¹¹¹

A. *Voter turnout: the most egalitarian form of political participation*

The average voter turnout for elections in the 16 countries in the Appendix Table 4 is about 76%.¹¹² Although the 2004 U.S. national elections showed a somewhat respectable turnout of almost 60%, the turnout for the 2006 national mid-term elections was 41.4%.¹¹³ The average turnout for U.S. congressional elections from 1945 to 2001 was 48%, which is quite low, compared to the average of 76% in 16 other countries. The turnout at local elections tends to hover at about 30% and below.¹¹⁴ Michael P. McDonald collected statistics from state elections from 1980-2006. His research documents voter participation rates between 35.3% and 55.3% using the VAP model and 38.1% and 60.3% using the VEP model and documents that voter turnout in the 2006 state elections averaged 37% VAP and 40.4% VEP.¹¹⁵ Even if state officials are re-

¹⁰⁹ Kenworthy & Pontusson, *supra* note 63, at 456 (referring to Allan Meltzer & Scott Richard, *A Rational Theory of the Size of Government*, 89 J. POL. ECON. 914 (1981)).

¹¹⁰ Kenworthy & Pontusson, *supra* note 63, at 459, 462 fig.9.

¹¹¹ Compare table 2, *infra* at 71-72 with table 3, *infra* at 72. The explanation is strengthened in the U.S. case by the data presented below, which shows that the poor have much lower voter turnout rates than those in the middle class and above.

¹¹² Derived from statistics of averages of voting age population ratios across 169 countries in parliamentary elections from 1945-2001 compiled by the International Institute for Democratic and Electoral Assistance. RAFAEL LÓPEZ PINTOR ET AL., VOTER TURNOUT RATES FROM A COMPARATIVE PERSPECTIVE 75, 83-84 (2002), <http://www.idea.int/publications/vt/upload/Voter%20turnout.pdf>. Note that not only is the U.S. significantly below every other country on this list, it ranks 138th out of the 169 countries in the survey. *Id.*

¹¹³ The U.S. census report for 2004 uses VEP which excludes those people of voting age who are not eligible to vote like certain immigrants and felons/ex felons. KELLY HOLDER, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE NOVEMBER 2004 ELECTION: POPULATION CHARACTERISTICS 1 (2006), <http://www.census.gov/prod/2006pubs/p20-556.pdf>. The statistics for the 2006 election turnout came from Non-Profit Voter Engagement Network and they also use VEP. *America Goes to the Polls: A Report on Voter Turnout in the 2006 Election*, available at <http://www.nonprofitvote.org/wp-content/uploads/AGtP.pdf>. Note that mid-term elections are generally much lower. *Id.*

¹¹⁴ Macedo & Karpowitz, *supra* note 84, at 59-60 (referring to STEPHEN MACEDO ET. AL., DEMOCRACY AT RISK: HOW POLITICAL CHOICES UNDERMINE CITIZEN PARTICIPATION AND WHAT WE CAN DO ABOUT IT 66 (2005) and Zoltan Hajnal & Jessica Trounstein, *Where Turnout Matters: The Consequences of Uneven turnout in City Politics*, 67 J. POL. 515 (2005), as well as others).

sponsive to voters, these numbers call into question the democratic pedigree of state legislative tort reform.

Writing prior to the 2000 elections, Alexander Keyssar noted that historically, low voter turnout correlated with class and education and that “the people who are least likely to be content and complacent (and most likely to need government help) are those who are least likely to vote.”¹¹⁶ This debunks the idea that Americans do not vote because they are generally content. He goes on to state that low voter turnout persists among the same groups to whom the franchise was limited throughout much of American history, namely, the poor, the young, certain minorities and those with less education (i.e. the “have-nots”).¹¹⁷

These observations were borne out in the 2004 elections. Those in the over \$50,000 income bracket had a 77% voter turnout, as opposed to those making less than \$20,000, which had a 48% voter turnout.¹¹⁸ The poor were greatly overrepresented among non-voters, while those making over \$100,000 a year were greatly underrepresented among non-voters.¹¹⁹ The employed had a 66% turnout, as opposed to a 50% turnout for the unemployed.¹²⁰ Those with bachelor’s degrees had about twice the voter turnout than those without high school degrees (78% versus 40%).¹²¹ The 18-24 year old bracket without a high school degree had a rate of fewer than 25%, while the same age bracket with college degrees had a 67% rate.¹²² Non-Hispanic white citizens had turnout rates at 67%, while African-American citizens were at 60%, Hispanic citizens at 47% and Asian citizens at 44%.¹²³ As one might predict, the increase in voter turnout for the 2004 election was not due to a higher turnout rate of African-Americans, Asian-Americans, Hispanic-Americans or the poor; instead, the increase was from non-Hispanic whites, who increased their turnout from 60.5%

¹¹⁵ United States Election Project, Voter Turnout Statistics, Turnout 1980-2006, <http://elections.gmu.edu/Turnout%201980-2006.xls> (last visited July 24, 2007). VAP stands for “voting age population” and includes everyone above the age of 18 while VEP stands for “voting eligible population” which excludes undocumented immigrants non eligible felons and others not eligible to vote. See also Michael P. McDonald, *State Turnout Rates Among Those Eligible to Vote, 1980-2000*, 2 ST. POL. AND POL’Y Q. 199 (2002).

¹¹⁶ KEYSSAR, *supra* note 11, at 320.

¹¹⁷ *Id.* at 321. The notable exception is women. HOLDER, *supra* note 113, at 2.

¹¹⁸ HOLDER, *supra* note 113, at 5. The income based statistics stop at \$100,000 and over and so it is difficult to know what the numbers are like for the very wealthy.

¹¹⁹ *Id.* at 10 tbl.C.

¹²⁰ *Id.* at 5.

¹²¹ *Id.*

¹²² *Id.* at 6.

¹²³ *Id.* at 7.

in 2000 to 67% in 2004, and from those making over \$50,000 per year, who increased their turnout from 72% in 2000 to 77% in 2004.¹²⁴

As noted above, voter turnout has also been used to explain the closely related phenomenon of a lack of responsiveness. Voting theorists, Griffin and Newman, found that voters are better represented than non-voters.¹²⁵ Given that the middle- and upper-income groups have better voter turnout rates than the poor, this may account for at least some of the difference in responsiveness.

There is a whole host of explanations for why certain minorities, the poor, and the uneducated have such low voter turnouts. Those explanations include: lack of a stake in the system (little to gain),¹²⁶ the complex non-user-friendly procedures,¹²⁷ conflicts with work, school or childcare obligations,¹²⁸ the fact that voting is not mandatory,¹²⁹ and the fact that the United States has a two party system, under which neither party caters to the interests of the poor.¹³⁰

Almost all of these factors have a disproportionate negative impact on the poor and uneducated. If elected officials were concerned about the groups that have such low voter turnout, a number of simple reforms would make it easier to go to the polls. As common sense suggests, given that those who failed to vote did not elect the representatives currently in office, those representatives lack incentives to enact reforms to bring them to the polls.¹³¹

¹²⁴ Compare HOLDER, *supra* note 113 (reporting on the voter turnout for the 2004 elections) with AMY JAMIESON ET AL., U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000: POPULATION CHARACTERISTICS 3, 5 (2002), <http://www.census.gov/prod/2002pubs/p20-542.pdf>.

¹²⁵ Griffin & Newman, *supra* note 107.

¹²⁶ Clinton's own secretary of labor said that "the great mass of non-voters . . . didn't vote in 1996 because they saw nothing in it for them." REICH, *supra* note 90, at 330.

¹²⁷ KEYSSAR, *supra* note 11, at 321. See also MARTIN WATTENBERG, WHERE HAVE ALL THE VOTERS GONE? 162 (2002). Wattenberg finds it impressive how good our turnout is, considering how complicated our process is compared to other countries. *Id.*

¹²⁸ This is because our elections are held during the work week and not on a public holiday. See WATTENBERG, *supra* note 1277, at 169-71. Wattenberg notes that in President Clinton's last official message to Congress he wrote: "We should declare election day a national holiday so that no one has to choose between their responsibilities at work and their responsibilities as a citizen." *Id.* at 170-71 (citing William Jefferson Clinton, 42nd President of the United States, The Unfinished Work of Building One America, Message to Congress (Jan. 15, 2001)).

¹²⁹ In the 9 countries where compulsory voting is enforced, the turnout rate is over 85% compared to nearly 75% in the 10 countries that do not enforce their mandatory voting laws. PINTOR ET AL., *supra* note 112. Compare this to the average of approximately 68% for the remaining 147 countries that do not have compulsory voting. *Id.* at 112.

¹³⁰ KEYSSAR, *supra* note 11, at 321. As he further notes, Clinton's own Secretary of Labor said that "the great mass of non-voters . . . didn't vote in 1996 because they saw nothing in it for them." *Id.* See also REICH, *supra* note 90, at 330.

¹³¹ Here, the democratic process has very little hope of correcting itself.

Setting aside the problems created by the two party system,¹³² which would be both practically and politically difficult to change, many other changes would be simple, for instance: make ballots less complicated,¹³³ make elections mandatory,¹³⁴ make election day a national holiday,¹³⁵ put it on a weekend,¹³⁶ simply extend the hours,¹³⁷ or allow for no-excuse absentee ballots.¹³⁸ These would significantly improve democratic participation.

B. Other more stratified forms of political participation

Bartels tested the hypothesis that voter turnout was the cause of lack of responsiveness, along with a few other contenders, e.g., “political knowledge” and “contact with senators and/or staff,” and found the latter to have the most significant impact on responsiveness.¹³⁹ By comparing his work with Sidney Verba’s, he was also able to roughly test the hypothesis that campaign contributions impacted responsiveness, and he found that, in two of the eight areas, the projected disparities in responsiveness matched the disparities in income contribution.¹⁴⁰ In the other areas, the disparities did not quite match the dollar for dollar disparities although, unsurprisingly, they did tend to fall in the same direction.¹⁴¹

¹³² See, e.g., AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999). See also Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT’L POL. SCI. REV. 297 (1997).

¹³³ Wattenberg notes that in Europe there are generally much fewer choices to make on ballots, making them much easier to complete. WATTENBERG, *supra* note 127, at 166.

¹³⁴ See PINTOR ET AL., *supra* note 112. See also WATTENBERG, *supra* note 127, at 164; Arend Lijphart, *Unequal Participation: Democracy’s Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1 (1997). Note that compulsory voting laws do not require that one actually vote, but they do require that one show up to vote unless one has an appropriate excuse or justification for not doing so. WATTENBERG, *supra* note 127, at 164.

¹³⁵ WATTENBERG, *supra* note 127, at 170-71.

¹³⁶ *Id.* at 169.

¹³⁷ *Id.* at 172 (drawing on the Japanese experience).

¹³⁸ Most states require a reason in order for one to register and vote with an absentee ballot. UNITED STATES ELECTION ASSISTANCE COMMISSION ELECTION DAY SURVEY, Ch. 5, Absentee Ballots, available at <http://www.eac.gov/clearinghouse/2004-election-day-survey/?searchterm=Chapter%205,%20Absentee%20Ballots>. The Commission notes that in those 24 jurisdictions with “no excuse” needed, the rate of requests was nearly four times as great as in those that required an excuse (20.1% vs. 5.1%). *Id.* at 10. This site also provides results for the number of absentee ballots returned, the number counted, the number not counted, and the five most common reasons for rejecting absentee ballots. *Id.* at 3-6.

¹³⁹ Bartels, *Economic*, *supra* note 84, at 24-29, 47 tbl.7.

¹⁴⁰ *Id.* at 28-29 (using SIDNEY VERBA ET AL., VOICE AND INEQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 194, 565 (1995)).

¹⁴¹ *Id.*

Despite low voter turnout rates, voters are the most numerous and most representative group of political activists.¹⁴² At the other end of the representative spectrum are campaign contributors, who are the least representative.¹⁴³ Eighty-five percent of those making a donation to a presidential candidate of over \$1,000 had at least a bachelor's degree, and 95% of the substantial donors to presidential candidates in 2000 made over \$100,000.¹⁴⁴ The race, sex and age discrepancies in donations of over \$200 to presidential candidates reflect similar discrepancies, with 96% of donations coming from Caucasians, 70% coming from males and over 99% of donations coming from those over age 30.¹⁴⁵ Those in the 18-30 age bracket contributed only 1%, while those over age 46 contributed 83% of the total donations.¹⁴⁶

Looking across the spectrum of participation, the statistics show that those making over \$75,000 per year are between two and six times more likely to participate in politics through campaign work, direct contact, protests, affiliation with political organizations, informal community activities, and campaign contributions than those making under \$75,000 per year.¹⁴⁷ Those with an income over \$75,000 per year have approximately twice as much direct contact as those making less than \$75,000 per year.¹⁴⁸ The numbers are not as drastic for race, but they do show significant disparities between Caucasians, African-Americans and Latinos.¹⁴⁹ The discrepancy in political activity between ages 18-24, as compared to ages 24-49 and 50-59, was about 1-2.¹⁵⁰ Note that the E.U. Council of Europe and the E.U. Ministers of Youth have expended considerable efforts to get youth below voting age to participate in politics, through direct integrations into the political processes, youth organizations, action-

¹⁴² SCHLOZMAN ET AL., *supra* note 45, at 22, 38.

¹⁴³ *Id.* at 22.

¹⁴⁴ *Id.* This group comprised only 12% of the population. *Id.*

¹⁴⁵ *Id.* at 38 tbl.3.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 22 fig.1. Class based stratification affects the entire range of political activities. KEYSSAR, *supra* note 11, at 321-22 (referring to VERBA, ET AL., *supra* note 141, at 1-13, 23-24, 511-33). "The affluent and well-educated are not only able to afford the financial costs of organizational support but they are in a better position to command the skills, acquire the information, and utilize the connections that are helpful in getting an organization off the ground or keeping it going." SCHLOZMAN ET AL., *supra* note 45, at 20.

¹⁴⁸ *Id.* at 22 fig.1.

¹⁴⁹ Gilens, *Inequality*, *supra* note 93, at 24 tbl.2. See also *id.* at 24 fig.3. In terms of mean number of political activities, Anglo-White men had 2.36 compared to 1.94 for Black men and 1.61 for Latino men. Among women, Whites had 2.08, Black's 1.86, and Latinas 0.9. *Id.*

¹⁵⁰ SCHLOZMAN ET AL., *supra* note 45, at 25 fig.4. It shows 1.26 political acts performed by those in the 18-24 age range compared with 2.17 in the 30-39 range, 2.54 in the 40-49 range, 2.52 in the 50-59 range, 2.35 for 60-69, with the numbers understandably dropping off for those over 70 to 1.82. *Id.*

oriented participation and through ombudsman representing the interests of children.¹⁵¹

Education is a central element in the relationship between socio-economic status and participation because it affects many other determinants of socio-economic status. It also affects the other determinants of participation (e.g., job, income, knowledge, civic and organizational skills), along with connections with other politically active people, who are more likely to enlist their aid in political activities.¹⁵²

Given the growing inequality in America, the low voter turnout among the poor and uneducated, the lack of access of middle- and lower-income Americans to politicians, and the resulting lack of influence on “representatives,” it is unsurprising that legislation in general, and tort reform in particular, would not tend to the needs and preferences of a majority of Americans, but would cater to the preferences of the few.

C. *Disenfranchised citizens (Illegal Americans)*¹⁵³

Since 1975, incarceration rates in the United States have quadrupled, and over 5.3 million felons and ex-felons are prohibited from voting.¹⁵⁴ Two

¹⁵¹ See, e.g., European Commission, Political Participation Starts at School, <http://ec.europa.eu/research/press/2006/pr2003en.cfm> (last visited July 24, 2007). See also EUROPEAN CENTER FOR SOCIAL WELFARE POLICY AND RESEARCH, POLITICAL PARTICIPATION OF YOUTH: A REMEDY AGAINST MARGINALIZATION AND SOCIAL EXCLUSION, http://www.euro.centre.org/detail.php?xml_id=393 (last visited July 24, 2007).

¹⁵² Gilens, *Inequality*, *supra* note 93, at 26. Access to selective colleges is highly skewed by race and ethnicity, and even more skewed by socio-economic status. ANTHONY P. CARNEVALE & STEPHEN J. ROSE, CENTURY FOUNDATION, SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 10-11, 69 tbl.1.1 (2003), available at http://www.tcf.org/Publications/Education/carnevale_rose.pdf. Carnevale and Rose found that “74 percent of the students at the top 146 highly selective colleges came from families in the top quarter of the SES scale (as measured by combining family income and the education and occupations of the parents), just 3 percent came from the bottom SES quartile, and roughly 10 percent came from the bottom half of the SES scale. If attendance at these institutions reflected the population at large, 85,000 students (rather than 17,000) would have been from the bottom two SES quartiles.” *Id.* at 11.

¹⁵³ The term “illegal American” is used because it tracks the pejorative term “illegal immigrant.” It is a way to mark them as “illegal” rather than as, say, hard-working, exploited immigrants. The label “illegal” is not generally used to categorize people when they break the law. For instance, there is little talk about the “illegal employer” problem in America. Felony disenfranchisement, particular post-release, is a way of marking people as outlaws or second class citizens.

¹⁵⁴ JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 77 (2006). Manza and Uggen put the number at 5.3 million with 39% having completed their sentences. *Id.* See also KATHERINE I. PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES (2005). As of July 2006, there were 4.9 people incarcerated out of every 1,000, which is almost one out of every 200 people. U.S. Department of Justice, Bureau of Justice Statistics, Prison Statistics, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited July 24, 2007). The

and a half percent of the general population is denied the right to vote.¹⁵⁵ The demographics for the prison population significantly overlap with those in society who have low voter turnout and low political participation in general. Richard Freeman of Harvard University and the National Bureau of Economic Research reports that the prison population is disproportionately black and young, with low education and literacy levels.¹⁵⁶ Information on released prisoners indicates that 14% have less than 8 years of schooling and 67% have less than a high school education.¹⁵⁷ Nearly half of the prison population consists of black males, and 68% of all prisoners are below the age of 34.¹⁵⁸

Ex-offenders are not successful in the job market. They have low employment rates and tend to earn less than others with similar demographics.¹⁵⁹ Further, nearly one-third has a physical impairment or mental condition and 21% have some physical or mental condition that impairs work ability.¹⁶⁰ As Freeman states, “[s]ince persons with physical and mental health problems, limited education, and poor literacy do badly in the US job market independently of a criminal record, [it should come as no surprise that] ex-offenders fare poorly in the job market.”¹⁶¹ It should also come as little surprise that, under these conditions, most ex-prisoners end up returning to prison.¹⁶²

The felon/ex-felon demographic is a distinct, insular and growing minority in American society. Although they represent an extreme case, their disenfranchisement is compounded by the fact that they have very little mobility, very little stake, and even less say about society’s future.¹⁶³

percentages for African American males at the end of 2005 was over 3%, compared to white males at less than .5% of their population. *Id.*

¹⁵⁵ LALEH ISPAHANI, ACLU, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 3 (2006), http://www.aclu.org/pdfs/votingrights/outofstep_20060525.pdf.

¹⁵⁶ RICHARD FREEMAN, CAN WE CLOSE THE REVOLVING DOOR? RECIDIVISM VS. EMPLOYMENT OF EX-OFFENDERS IN THE U.S.A. (The Urban Inst. Reentry Roundtable Discussion Paper, 2003), available at <http://www.ssw.umich.edu/events/CASD/freeman.pdf>.

¹⁵⁷ *Id.* at 7, 17 tbl.3.

¹⁵⁸ *Id.* at 15 tbl.1.

¹⁵⁹ *Id.* at 9-10 (referring to Richard Freeman, *Economics of Crime*, in 3C THE HANDBOOK OF LABOR ECONOMICS Ch. 52 (Orley Ashenfelter & David Card eds., 1999)); and Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526 (2002)).

¹⁶⁰ *Id.* at 10, 11, 19 tbl.5.

¹⁶¹ *Id.* at 13.

¹⁶² *Id.* at 2 (citing PATRICK LANGAN & DAVID LEVIN, U.S. DEPARTMENT OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002), <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>)).

¹⁶³ This is also true of the over 10 million unauthorized immigrants living in the United States. For the numbers see JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 1 (2005), <http://pewhispanic.org/files/reports/46.pdf>. Unauthorized immigrants provide a cheap, hardworking and docile labor force. Their presence keeps authorized immigrants and U.S. citizens relatively docile while keeping their wages low. They also provide a scapegoat for our woes and threats to our security, even though they put much more into our economy than they take out (including social security and taxes) and there have been few if

Looking at the phenomenon comparatively, the United States incarcerates between five and eight times the number of people incarcerated in other advanced industrial nations.¹⁶⁴ The overwhelming majority of Western European states have no ban on voting at all,¹⁶⁵ or only ban voting for specific criminals who commit certain serious crimes, usually as explicit additional aspects of their prison sentence.¹⁶⁶ While twelve European states completely ban voting for incarcerated prisoners,¹⁶⁷ ten of these twelve states are former Eastern Bloc countries with a history of limited enfranchisement.¹⁶⁸ Of the two Western European countries, Spain and the United Kingdom, Spain rarely disenfranchises its prisoners,¹⁶⁹ and the practice of blanket bans in the United Kingdom has been recently condemned by the European Court of Human Rights in *Hirst v. United Kingdom (No 2)*.¹⁷⁰ Further, while some countries disqualify ex-felons from voting, “the sanction is purposefully and narrowly targeted, and the number of disenfranchised people is probably in the dozens or hundreds. In the United States, the disqualification is automatic, pursues no defined purpose and affects millions.”¹⁷¹

Not only has the European Court of Human Rights condemned practices like those in the U.S., but so have the Supreme Court of Israel,¹⁷² the Supreme Court of Canada,¹⁷³ and the Constitutional Court of South Africa.¹⁷⁴ These

any terrorists threats coming from unauthorized immigrants, especially from Mexico. The nineteen 9/11 terrorists entered the country legally. 9/11 COMMISSION REPORT 27 (2004).

¹⁶⁴ ISPAHANI, *supra* note 155, at 3.

¹⁶⁵ *Id.* Seventeen European states do not ban voting at all, nine of which are Western European states. *Id.*

¹⁶⁶ *Id.* at 7. Eleven states fall in this category, with eight of them coming from Western Europe (Greece is counted in this tradition). *Id.*

¹⁶⁷ *Id.* at 8.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 681 Eur. Ct. H.R. (2005) (discussing a U.K. law denying the vote to all prisoners, stating, “Such a general, automatic, and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide the margin might be, and as being incompatible with Article 3 of Protocol No. 1.”); ISPAHANI, *supra* note 155, at 8.

¹⁷¹ ISPAHANI, *supra* note 155, at 6.

¹⁷² See HCJ 2757/06 Hilla Alrai v. Minister of Interior [1996] IsrSC 50(2) 18 (refusing to disenfranchise Yigal Amir, the individual convicted of assassinating Yitzak Rabin, the Israeli Prime Minister). “[W]ithout the right to elect, the foundation of all other rights is undermined Accordingly every society should take great care not to interfere with the right to elect except in extreme circumstances.” *Id.* at 133-39.

¹⁷³ See *Sauvé v. Canada*, [2002] 3 S.C.R. 519 (Can.) (striking down a law which denied the right to vote to those serving more than two years). “Denying a citizen the right to vote denies the basis of democratic legitimacy [I]f we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government’s power flows.” *Id.* at para. 32.

countries recognize that denying prisoners the right to vote is not undesirable merely because it harms the individual who loses the right, but because it harms the democratic legitimacy of the state. As McLachlin CJ, writing for the majority in *Sauvé v. Canada*, said:

The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claims to representative democracy, and erodes the basis of its right to convict and punish lawbreakers.¹⁷⁵

Denying prisoners the right to vote, particularly after they have served their time, is a throw-back to pre-democratic times, when "democracy" was reserved for certain classes of people. The current trend sends the message that prisoners, and even ex-prisoners, are no longer a part of the same "democratic" America. This is particularly troubling, given that this class is greatly overrepresented by minorities, the economically disadvantaged, the educationally deprived and those with mental and physical disabilities. Taking away this right sends the message that these people are second class citizens and, in effect, "illegal Americans."

V. THE TORT REVOLUTION AND COUNTER-REVOLUTION

The current wave of tort reform has been variously referred to as "tort deform," "tort retrenchment," "corporate cost shifting" or "corporate welfare." While some would like to depict the recent trend in tort law as a semi-autonomous development in the law to meet the needs of the day, this is not an accurate view. The current wave of tort "reform" is tied to a systematic and coordinated campaign¹⁷⁶ "by an army of corporations, foundations, lobbyists,

¹⁷⁴ See *National Institute of Crime Prevention and the Re-Integration of Offenders (NICRO)*, Erasmus and Schwagerl v. Minister of Home Affairs 2004 (3) SA 4 (CC) (S. Afr.) (striking down the Electoral Laws Amended Act 34 of 2003, which denied the right to vote for those serving prison sentences that did not have the option of a fine); *August and Another v. Electoral Commission and Others* 1999 (8) SA 99 (CC) (S. Afr.) (holding that the Electoral Commission, by not providing the means and mechanisms for prisoners to vote, had breached the prisoner's rights to vote under the Constitution).

¹⁷⁵ *Sauvé v. Canada*, [2002] 3 S.C.R. 519, para. 34.

¹⁷⁶ FEINMAN, *supra* note 9. According to Feinman, Federalist Society members boasted that they occupied all of the assistant attorneys general positions and more than half of all other political appointments within the Reagan-Meese Justice Department. *Id.* at 189. Further, one fourth of all federal judicial candidates under the second Bush administration were recommended by the Federalist Society and most of the lawyers in the White House Counsel's office have been active members. *Id.*

litigation centers, think tanks politicians and academics,”¹⁷⁷ to unmake or undo developments over the last 100 years across the common law.¹⁷⁸ This wave has its roots in a comprehensive view of the role of government in society that was in its heyday over 100 years ago, namely the laissez-faire view.¹⁷⁹ The idea is a return to a time of minimal government interference with capitalists and their market and to pre-modern or classical legal thought, under which judges are mere neutral referees, rather than guardians of justice. Here, individual negative rights, embodying such notions as “freedom of contract” and “buyer beware,” trump public policy, embodying ideas such as “corporate responsibility,” “consumer safety,” and the need for the government to intervene sometimes to ensure that people actually are free. As pointed out above, this is a return to *Lochner* era values.¹⁸⁰ It is worth remembering that the *Lochner* era came to an end, in part, because of democratic developments and the realization that unchecked private power in the hands of the few could be just as large a threat to the actual freedom and equality of the people as unchecked public power.

A common critique of the recent “tort reform campaign” is that it is based on misinformation, if not lies.¹⁸¹ E. Patrick Hubbard has deftly noted that the “tort reform” movement has adopted a political model of truth, rather than a rational model of truth, and that this model has been very successful, in part, because we live in the “age of truthiness.”¹⁸² “Truthiness” which won the word of the year award from both the American Dialectic Society in 2005¹⁸³ and Mer-

¹⁷⁷ *Id.* at 189.

¹⁷⁸ Jay Feinman traces this campaign all the way back to Ronald Reagan’s inaugural address, where he stated that “Government is not the solution to our problems; government is the problem.” FEINMAN, *supra* note 9, at 172. The tort reform campaign came together in the Tort Policy Working Group within the Reagan-Meese justice department. *Id.* at 186 (citing the TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986)). See also Dawn Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003). For a comprehensive database on state tort reform totaling over 1,000 pages see RONEN AVRAHAM, DATABASE OF STATE TORT LAW REFORMS (2006) (Northwestern Law & Econ Research Paper No. 06-08), available at <http://ssrn.com/abstract=902711>.

¹⁷⁹ FEINMAN, *supra* note 9, at 172 (citing JOHN B. JUDIS & TUY TEIXEIRA, THE EMERGING DEMOCRATIC MAJORITY 151-52 (2002)).

¹⁸⁰ *Id.* at 3-5, 7-18. Compare this with Law, *supra* note 30 (making similar comments regarding the Rehnquist Court).

¹⁸¹ See Lind, *supra* note 37, at 719; Abel, *supra* note 37, at 556; Goldberg, *supra* note 15; Priest, *supra* note 37, at 683; Eaton, *supra* note 37; Witt, *supra* note 37; Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717, 721-22 (1998) [hereinafter Galanter, *Oil Strike*].

¹⁸² Hubbard, *supra* note 40, at 530 (citing Frank Rich, Op-Ed, *Truthiness 101: From Frey to Alito*, N.Y. TIMES, Jan. 22, 2006, § 4, at 16, available at 2006 WLNR 1184978 for the view that we live in the “age of truthiness”).

¹⁸³ Press Release, American Dialect Society, Truthiness Voted 2005 Word of the Year (Jan. 6, 2006), http://www.americandialect.org/Words_of_the_Year_2005.pdf.

riam-Webster in 2006,¹⁸⁴ was popularized and given its current meaning on the *Colbert Report* by Stephen Colbert. Mr. Colbert defines “truthiness” as “sort of what you want to be true, as opposed to what the facts support. . . . Truthiness is a truth larger than the facts that would comprise it—if you cared about facts, which you don’t, if you care about truthiness.”¹⁸⁵ Jay Feinman goes further in *Unmaking Law*, stating, “[t]he problem with the conservative campaign, however, is that it is false. Not debatable, or a matter of opinion or political viewpoint, but false.”¹⁸⁶ Its falsity is based in many little lies, in which cases are exaggerated, and the amount of and the effect of frivolous lawsuits, the impact of regulations on property rights, as well as the impact of liberal adjudication on the sanctity of contract are all overstated.¹⁸⁷ When combined, they feed into the big lie that the common law has been hijacked by greedy plaintiffs and lawyers, as well as by liberal activist judges.¹⁸⁸

The tort reform campaign has been principally advanced by large corporate interests, who, as shown above, have the means necessary to make their voices heard.¹⁸⁹ They often use mass media as a vehicle for spreading their ideas.¹⁹⁰ Most of these “tort reform” advocates have little reason, beyond their own self-interest, to endorse the tort reform agenda.¹⁹¹ These so-called reformers have the “singular purpose of furthering their political agenda by enraging the public over a civil justice system supposedly gone awry.”¹⁹² Corporations have portrayed themselves as blameless victims, while portraying individuals (and their lawyers) as the aggressors.¹⁹³ They accomplish this by distorting the

¹⁸⁴ <http://www.merriam-webster.com/info/06words.htm>.

¹⁸⁵ Hubbard, *supra* note 40, at 530 (citing Jacques Steinberg, *Truthiness*, N.Y. TIMES, Dec. 25, 2005, § 4, at 3, available at 2005 WLNR 20926880, quoting Colbert’s comments from a “recent interview”).

¹⁸⁶ FEINMAN, *supra* note 9, at 190.

¹⁸⁷ *Id.* at 191.

¹⁸⁸ *Id.*

¹⁸⁹ See HALTOM & MCCANN, *supra* note 40, at 8; Rustad & Koenig, *supra* note 21; Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397 (2000); Galanter, *Oil Strike*, *supra* note 181. For example, one estimate states that, in 1999, the insurance industry alone spent \$85.6 million for lobbying. HALTOM & MCCANN, *supra* note 40, at 48. A report compiled by the California Nurses Association/National Nurses Organizing Committee’s research arm, the Institute for Health and Socio-Economic Policy notes that “healthcare industry contributions to the 18 currently announced Republican and Democratic presidential candidates total an aggregate \$12.8 million since 1989, over \$3.7 million of that amount just in the first quarter of 2007 alone.” *New Report Details Healthcare Industry’s Massive Spending in Presidential Campaign, Federal Lobbying*, PR Newswire, June 22, 2007, available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/06-22-2007/0004613490&EDATE>.

¹⁹⁰ See HALTOM & MCCANN, *supra* note 40, at 8; Rustad & Koenig, *supra* note 21, at 51.

¹⁹¹ Peck et al., *supra* note 189, at 398.

¹⁹² *Id.*

¹⁹³ Galanter, *Oil Strike*, *supra* note 181, at 733; Rustad & Koenig, *supra* note 21, at 4.

facts and turning “bizarre cases that almost happened into a report of something typical and prevalent.”¹⁹⁴ There are generally four characteristics of “tort tales” that “tort reformers” tell: 1) elegance (they communicate moral messages that are instantly understandable);¹⁹⁵ 2) stereotypic characterization (plaintiffs are blameworthy, defendants are not); 3) holler of the dollar (plaintiffs are always greedy); and 4) extraordinary occurrences symbolize ordinary outcomes (as if they were normal occurrences).¹⁹⁶ These types of unfounded claims are typical of the type of ammunition used by tort reformers.¹⁹⁷ For example, while tort reformers claim that punitive damages are “out of control,”¹⁹⁸ studies have shown that they are only awarded in about 6% of all the cases won by plaintiffs.¹⁹⁹

Given the data and arguments put forth above in Parts III and IV, one does not need to be a conspiracy theorist to predict that a well-organized and well-funded campaign to institute reform for the “haves” by the “haves” in the area of tort law would be successful, even if it was not good for the majority of Americans. The pervasive disinformation that accompanies this movement has, no doubt, acted like grease on a pig for those fighting against these “reforms,” while acting like grease on the cogs of the machine for those pushing the reforms. This undermines the democratic principle that political choices are the result of deliberation among political equals. Distorted deliberations make it nearly impossible for people to give voice to their interests or preferences, since the disinformation often results in people thinking that they want choice A, when they really would prefer choice B, if they knew all the facts. Although there have been countless studies refuting most of the key assertions used to justify the “tort reform” movement, its jaundiced view of the legal system still flourishes. No doubt, it does so because these “tort tales” are cast as legends

¹⁹⁴ Galanter, *Oil Strike*, *supra* note 181, at 728. For example, Galanter refers to a case where a woman claimed she lost her psychic abilities due to a CAT scan and a million dollar verdict was given but later thrown out. *Id.* at 726-27. Galanter also refers to the McDonald’s case, where the fact that the coffee spilt was a 180 degrees, caused third degree burns and the plaintiff needed skin grafts, is often left out of the story. *Id.* at 731-33. Further, it is seldom reported that the \$2.9 million verdict against McDonald’s was reduced to \$480,000. *Id.* Feinman refers to a case where a man sued the dairy industry and Safeway stores claiming that drinking milk increased his risk of stroke. FEINMAN, *supra* note 9, at 24. In reality, however, the claim was dismissed. *Id.*

¹⁹⁵ As Marc Galanter puts it, “[t]he jaundiced view resonates with cultural themes of individualism and self-reliance and has a strong nostalgic component.” Galanter, *Oil Strike*, *supra* note 181, at 720.

¹⁹⁶ HALTOM & MCCANN, *supra* note 40, at 62-63. For an interesting example of this strategy see American Tort Reform Association, Looney Lawsuits, <http://www.atra.org/display/13> (last visited July 24, 2007). Also, in 1995, the ATRA received half of its budget from tobacco companies. HALTOM & MCCANN, *supra* note 40, at 46.

¹⁹⁷ Further, tort reformers consistently ignore positive aspects of the tort system, such as deterrence. See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 90 (1993) [hereinafter Galanter, *Nowhere*].

¹⁹⁸ FEINMAN, *supra* note 9, at 69.

¹⁹⁹ *Id.* See also *infra* note 275 for other low estimates on the award of punitive damages.

that resonate with the basic themes of individual responsibility and self-reliance, which are core to American political and legal culture.²⁰⁰ The result is a perverse form of corporate welfare, where companies are able to shift responsibility for their conduct off their shoulders and onto the shoulders of individual consumers.

The remainder of this Article begins with a brief discussion of both the main achievements in democratic tort reform, as well as the recent retrenchment of some of those achievements, along with other regressive changes in tort law. Then, it examines the role of the Supreme Court in tort reform to show the unprecedented extent to which that institution has engaged in an area generally considered the domain of the states, their courts and Congress, to the detriment of the people and of democracy. It demonstrates that as American democracy goes, so does tort reform.

Before beginning the exploration of tort reform, it might be wise to respond to a preliminary objection. One may argue that, since the bulk of progressive tort reform during the 1960s and 1970s was judicially created and most of the tort reform since the 1980s is legislative, the latter trend of regressive tort reform must have a better democratic pedigree than the former. This is dubious for at least two reasons. First, it is by no means settled that the bulk of progressive tort reform in the former period was judicial (see Part IV.A. below). More importantly, given the evidence above that America's traditional "democratic" institutions (the executive and legislative branches) are skewed, or corrupted from the perspective of democratic values, it follows that courts, which are generally insulated from interest group power politics and required to justify their decisions to the public through written decisions, may have a better chance of delivering decisions that are democratically justifiable. This is particularly true in the area of personal injury tort law, where, generally, the plaintiff class is unorganized and under-funded, and the defendant class is well-organized and well-funded.²⁰¹ Potential victims have neither the motive nor the easy means for organizing. Most people do not think of themselves as potential plaintiffs and, thus, are not generally mobilized to press their concerns. In contrast, most businesses and their associations do consider the potential of being a defendant, and thus, they have both the motive and the means to press their interests in tort reform through experts, lobbying, and campaign contributions.²⁰² Richard Abel also notes that the plaintiffs' bar may put its own interests ahead of plaintiffs'

²⁰⁰ Galanter, *Oil Strike*, *supra* note 181, at 722. As Kevin O'Leary notes in KEVIN O'LEARY, *SAVING DEMOCRACY* (2006), democratic theorists as diverse as Jon Elster, Jurgen Habermas and John Rawls's all hold the view that "political choice, to be legitimate, must be the outcome of deliberation about ends among free, equal, and rational agents." O'LEARY, *id.* at 163 (quoting Jon Elster, *Introduction*, in *DELIBERATIVE DEMOCRACY* 5 (Jon Elster ed., 1998)).

²⁰¹ Of course this is not true of business to business torts, but business to business torts are largely unaffected by tort reform. Nockleby & Curreri, *supra* note 1, at 1080-85.

²⁰² See Abel, *supra* note 37, at 536-37.

interests in its confrontation with the defense bar over tort reform, for example, on issues like no-fault automobile compensation schemes.²⁰³

One way around the lack of influence in the judicial sphere is to contract out of court-based dispute resolution and into arbitration, where businesses, particularly businesses that are repeat players, have a distinct advantage.²⁰⁴ The other tactic is to try to break down the barriers that insulate courts as much as possible, and this takes place, in part, through concerted efforts to get pro-tort reform judges elected and appointed. For instance, the movement to dismantle strict liability in products cases in California came after three liberal judges were voted off the bench and replaced with conservatives in 1986.²⁰⁵ The politicization of the judiciary took off under former President Reagan and continues to thrive today.²⁰⁶ As David Law notes, “commentators have singled out Reagan for taking the politicization of the judiciary to new heights by implementing a centralized high-level process for the ideological vetting of judicial candidates.”²⁰⁷ According to one commentator, Reagan was very successful in appointing circuit court justices that remained faithful to his conservative agenda.²⁰⁸ Since Reagan, this has been reinforced by the active participation of conservative groups in the process of judicial nominations.²⁰⁹

²⁰³ *Id.* at 537.

²⁰⁴ See Part V.B.4 *infra* for the Supreme Court’s support of this move. See also Bryant G. Garth, *Tilting the Justice System from ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002).

²⁰⁵ Stephan D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with “New” Torts*, 49 DEPAUL L. REV. 455 (1999).

²⁰⁶ Note the early Department of Justice reports under Reagan. OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION* iii (1988), available at <http://islandia.law.yale.edu/acs/conference/meese-memos/year2000.pdf> (focusing on 15 key areas of constitutional controversy likely to go before the Court between 1988 and 2000).

²⁰⁷ David Law, *Appointing Federal Judges: The President, The Senate and the Prisoner’s Dilemma*, 26 CARDOZO L. REV. 479, 485-86 (2005) (referring to Elliot E. Slotnick, *Federal Judicial Selection in the New Millennium, Prologue*, 36 U.C. DAVIS L. REV. 587, 589-90 (2003); and Michael J. Gerhardt, *Judicial Selection As War*, 36 U.C. DAVIS L. REV. 667, 678 (2003) (remarking upon Reagan’s reputation for attending to the ideology of his judicial nominees)).

²⁰⁸ SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 307 (1997).

²⁰⁹ FEINMAN, *supra* note 9, at 189. See also Nina Totenberg, *Conservative Groups Push for More Judicial Confirmations*, NPR, June 28, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5517409>. “Conservative groups are urging President Bush and Senate Republicans to push harder to get more of the president’s judicial nominees approved. Social conservatives wanted more confirmations before the November elections in case the GOP loses Senate seats.” *Id.*

A. *Tort reform in general*

1. *Progressive democratic tort reform*

The earliest sign of democracy reinforcing tort reform began in the early 1900s, when workmen's compensation schemes started to spread. The schemes attempted to find collective justice for workers who were severely disadvantaged by the extant rules of the tort system.²¹⁰ However, other than workmen's compensation and Cardozo's opinion in *MacPherson v. Buick Motor Co.*, little reform occurred, until the "Democratic Expansionary Era" after the Second World War.²¹¹

During the Democratic Expansionary Era, the courts moved from a view of the tort system as providing case-by-case corrective justice, to a view of the system as a mechanism for collective justice, or providing justice across classes of cases.²¹² This transition, in part, contributed to courts using tort law, not only for restorative justice (putting plaintiffs back to where they were before the tort) but also for other social goals, namely deterring wrongs and providing incentives for manufacturers to make their products safer for society.²¹³ Courts stopped merely accepting the status quo distributions of power and wealth and began tailoring corrective justice to collective and distributive justice concerns.

Democratic developments during this Era resulted in the removal of immunity at both the federal level and the state level.²¹⁴ It began with the Fed-

²¹⁰ The extant rules included such defenses as the fellow servant exception to master servant liability, voluntary assumption of risk, and contributory negligence. See ARTHUR LARSON, 1-2 LARSON'S WORKERS' COMPENSATION LAW §§ 2.03, 2.07-2.08 (2005). Some courts did temper these defenses in the late 1800s and early 1900s allowing more workers to gain compensation, however the bulk of workers injured on the job were left without compensation or with very little compensation. *Id.* at § 2.04, 2.07. See also Part V. *infra*. See LARSON, *supra*, at § 4, 7. These were also years of progress for the women's suffrage movement. Note that women's rights to tort compensation were also limited from the 1800s to the modern period. See Rustad & Koenig, *supra* note 21, at 34-35. See also Margo Schlanger, *Injured Women Before Common Law Courts: 1860-1930*, 21 HARV. WOMEN'S L.J. 79 (1998).

²¹¹ *Macpherson v. Buick Motor Co.*, 111 N.E. 1050, 1051-55 (N.Y. 1916) (holding that Buick owed a duty of care to the ultimate purchaser despite the absence of privity); Rustad & Koenig, *supra* note 21, at 38 (describing the period from 1945 to 1980 as the "Democratic Expansionary Era").

²¹² FEINMAN, *supra* note 9, at 53 (Feinman puts the starting date at 1920). The previous era (the late 1800s to early 1900s) is often recognized as an era where the compensatory function of tort law was constricted. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 61 (1980).

²¹³ There of course is the challenge that this should be left to legislators to decide. Cf. Abel, *supra* note 37.

²¹⁴ Sovereign immunity from suit was abandoned in France by 1905. The first case to undermine the doctrine occurred in 1873 with the Tribunal des Conflicts cases of l'arrêt Blanco TC 8 Feb 1873, D.1873.17 (according jurisdiction to the administrative courts for actions brought against the state for damages caused by actions of persons employed in the public service) and the

eral Tort Claims Act of 1946, 28 U.S.C. section 2875, and most states followed with similar legislation opening up their courts for suits, thereby making the state and the people equal before the law.²¹⁵ In the 1960s, Congress passed the 1964 Civil Rights Act, which provided statutory tort actions for discrimination in employment, housing, education, and public accommodations on the basis of race, sex, national origin, or religion.²¹⁶ Developments also occurred in the area of consumer protection and products liability,²¹⁷ which were crystallized in the Restatement Second of Torts in 1965.²¹⁸ Comparative fault did not begin to overtake the draconian rule/defense of contributory negligence (which, in many cases, completely barred a plaintiff from bringing a claim if she was at all negligent) until the 1970s.²¹⁹ The courts also narrowed the general “no duty” rule in torts (one is not responsible for others and has no positive duties towards them) during the 1970s, when they began imposing duties on people in “special relations” with others (e.g., psychiatrists and patients, common carriers and passengers, schools and their pupils, landlords and tenants, and businesses and their customers).²²⁰ These reforms helped to consolidate democracy by providing enforcement mechanisms for hard-won democratic rights and making it easier for those, whose rights had been violated, to access the justice system and vindicate those rights.

2. Regressive tort reform

The Tort Policy Working Group from the Ronald Reagan-Edwin Meese Justice Department, one of the main catalysts of the counter-revolution in torts, came to life, in part, because of the liability insurance crisis of the 1980s.²²¹ The Group identified a number of “causes” of the so-called “crisis”²²² and a set of recommendations or strategies for attacking the “crisis.” They summarily excluded all other explanations besides the civil justice system, and thus, unsur-

doctrine was solidified by 1905 in the case of *Tomaso Grecco*, CE 10 Feb 1905, D.1906.3.81. See DUNCAN FAIRGRIEVE, *STATE LIABILITY IN TORT: A COMPARATIVE LAW STUDY* 12-13 (2003).

²¹⁵ See FEINMAN, *supra* note 9, at 56-57; DAN B. DOBBS, *THE LAW OF TORTS* § 268 (2000). England also followed suit in 1947 with the Crown Proceedings Act of 1947, although vestiges of immunity still exist. FAIRGRIEVE, *supra* note 214, at 12, 14-16.

²¹⁶ 42 U.S.C. §§ 2000e-1 to 2000e-17 (2001).

²¹⁷ *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963). See also FEINMAN, *supra* note 9, at 55-56. Rustad and Koenig note a whole range of progressive decisions by the California courts during this era. Rustad & Koenig, *supra* note 21, at 45-49.

²¹⁸ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

²¹⁹ Nockleby & Curreri, *supra* note 1, at 1069-70.

²²⁰ *Id.* at 1066-69.

²²¹ FEINMAN, *supra* note 9, at 25.

²²² *Id.* at 26. The “causes” identified by the Group included the decline of fault as the basis for liability, the undermining of causation, the explosive growth in damage awards, and the high transaction costs of the system. *Id.*

prisingly, their recommendations or strategies focused only on attacking that system by: 1) making it harder for injury victims to get into court; 2) making it more difficult to win once plaintiffs are in court; and 3) restricting damage recoveries for plaintiffs who do win.²²³ This, in perhaps oversimplified terms, has provided the core agenda for the tort reform movement ever since.²²⁴ Recently, the movement has also adopted the strategy of preempting state tort law through the promulgation of federal administrative rules.²²⁵

a. Keeping plaintiffs out of court

There are a whole range of mechanisms or tactics that help reduce the number of claims made by potential plaintiffs (other than reducing negligence and making products safer). One mechanism for keeping plaintiffs out of court has been to make it less attractive for lawyers to take cases, by putting limits on contingency fees²²⁶ and creating “early offer” mechanisms (which include attorney fee limits) for economic damages, which would preclude, or make it very difficult to receive non-economic damages, such as pain and suffering.²²⁷ Another tactic is to make it difficult for states to hire attorneys for complex litigation (e.g., tobacco and gun cases).²²⁸ And finally, one can make it harder for people to join together in class actions.²²⁹

This last tactic is embodied in the Class Action Fairness Act of 2005, which transfers many class actions from state courts to federal courts.²³⁰ The federalization of class actions may act to deny or impede plaintiffs’ access to

²²³ *Id.* at 25, 27. For a compelling argument that the liability insurance crises of the 1970s, mid 80s and in 2001 were all due to the market interest rate returns on insurance company investments rather than personal injury claims, see JOANNE DOROSHOW & J. ROBERT HUNTER, INSURANCE “CRISIS” OFFICIALLY OVER – MEDICAL MALPRACTICE RATES HAVE BEEN STABLE FOR A YEAR 3 (2006), <http://insurance-reform.org/pr/MMSOFTMARKET.pdf>. See also Frank A. Perrecone & Lisa R. Fabiano, *The Fleecing of Seriously Injured Medical Malpractice Victims in Illinois*, 26 N. ILL. U. L. REV. 527 (2006).

²²⁴ *Id.* Note the structure of this overview follows the structure of FEINMAN, *supra* note 9, at 27-46, but is not limited to its substance.

²²⁵ See, e.g., Hubbard, *supra* note 40, at 538 (predicting that this will be one of the new forums for pushing for reforms). See also Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

²²⁶ FEINMAN, *supra* note 9, at 27-28.

²²⁷ *Id.* at 29-30.

²²⁸ *Id.* at 30-31.

²²⁹ *Id.* at 31-32.

²³⁰ Pub. L. No. 109-2, 119 Stat. 4 (2005) (to be codified at 28 U.S.C. §§ 1332(d), 1335(a)(1), 1453, 1603(b)(3), 1711-15). The literature on the act is extensive. See, e.g., Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695 (2006). See *id.* at 1696 n.1 (an extensive list of academic commentary on the Act). As Klonoff and Herrmann state, “It is well known that under CAFA, most major class actions, including virtually all multistate class actions, will now be heard in federal court.” *Id.* at 1697.

justice for a number of reasons,²³¹ including the relative difficulty of certifying classes in federal courts,²³² and delays that result from further burdening the already overcrowded federal courts.²³³ Further, to the extent that conservatives have managed to take over the federal judiciary and/or to secure anti-litigation justices on the federal bench, one would expect more bias against plaintiffs, in general, and against class actions, in particular.²³⁴ As shown below, access to courts can also be limited through the enforcement of arbitration agreements, which often preclude class actions²³⁵ and by definition limit access to the courts, both in the first instance and as a matter of review.

b. Making it harder for plaintiffs to win cases

The more direct route to reducing the number and amount of claims is to change the liability rules to make it harder for plaintiffs to win when they get to court. This occurs by making liability less strict in products liability cases,²³⁶ setting up procedural obstacles in medical malpractice cases,²³⁷ and providing

²³¹ Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1654 (2006).

²³² The federal courts' reluctance to issue class certification is well documented (referring to S. Rep. No. 106-420, at 57-59 (2000) (noting minority senators' views on CAFA) (noting also that a review of forty-three class action cases involving life insurance marketing practices found that cases were nearly twice the certification in state court as in federal court) (referring to PUBLIC CITIZEN, UNFAIRNESS INCORPORATED: THE CORPORATE CAMPAIGN AGAINST CONSUMER CLASS ACTIONS 85 (2003), <http://www.citizen.org/documents/ACF2B13.pdf>).

²³³ Kanner, *supra* note 231, at 1654. For the view that class actions are undemocratic because they have led to substantive changes in the law, which did not go through the legislative process, see Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003).

²³⁴ For an account of the Republican efforts to appoint conservatives to the bench since Reagan, see, e.g., Law, *supra* note 30, at 485-86 (noting that Reagan succeeded in making ideological considerations paramount: by one observer's count, over three-quarters of his circuit court appointees furthered his conservative agenda, with the balance appearing to reward the party faithful). *Id.* at 490.

²³⁵ See *infra* Part V.B.4.

²³⁶ See FEINMAN, *supra* note 9, at 34-40. See *infra* Part V. In fact, the move is to return certain forms of products liability to a negligence standard.

²³⁷ See, e.g., Thomas Baker, *Reconsidering the Harvard Medical Malpractice Study: Conclusions About the Validity of Medical Malpractice Claims*, 33 J.L. MED. & ETHICS 501, 511 (2005). Commenting on the effect of the Harvard Medical Malpractice Study (HMPS), Baker notes:

[P]olicymakers have seized on the weakest aspect of the HMPS, the analysis of the validity of medical malpractice claims, and used that analysis to justify imposing caps on damages in medical malpractice cases and additional procedural hurdles for medical malpractice claimants. For that reason the practical impact of the HMPS may well have been to expand the gap between the large number of people who are injured by medical malpractice and the few people who are compensated and to increase the likelihood that the compensation that is received will be inadequate.

immunity from suit for certain industries.²³⁸ This has been the case with gun manufacturers,²³⁹ as well as with biomaterials manufacturers.²⁴⁰ This also makes it less likely that plaintiffs and their lawyers will sue in the first place.

c. Capping damages and making punitive damages harder to get

Finally, one of the most active areas of tort reform has centered around limiting damages, which has occurred by placing limits on joint and several liability,²⁴¹ limiting the collateral source rule,²⁴² and capping non-economic damages,²⁴³ including both punitive damages²⁴⁴ and pain and suffering damages.²⁴⁵ In addition to placing caps on punitive damages, tort reform has also

Id.

²³⁸ This also echoes the reinvigorated state immunity doctrine of the Supreme Court. *See infra* Part V.B.5.

²³⁹ FEINMAN, *supra* note 9, at 33; Daniel Feldman, *Legislating or Litigating Public Policy Change: Gunmaker Tort Liability* 12 VA. J. SOC. POL'Y & L. 140 (2004). *But see* John Fowler, *Will a Repeal of Gun Manufacturer Immunity from Civil Suits Untie the Hands of the Judiciary?*, 34 MCGEORGE L. REV. 339 (2003) (repealing immunity in California).

²⁴⁰ FEINMAN, *supra* note 9, at 33-34. *See also* James D. Kerouac, Note, *A Critical Analysis of the Biomaterials Access Assurance Act of 1998 as Federal Tort Reform Policy*, 7 B.U. J. SCI. & TECH. L. 327 (2001).

²⁴¹ *See, e.g.*, NAT'L ASS'N OF MUT. INS. COS., JOINT AND SEVERAL LIAB. REFORM STATES, <http://www.namic.org/reports/tortReform/JointAndSeveralLiability.asp> (last visited July 24, 2007) (the National Association of Mutual Insurance Companies' report on Joint and Several Liability Rule Reform).

²⁴² *See* NAT'L ASS'N OF MUT. INS. COS., COLLATERAL SOURCE RULE REFORM, <http://www.namic.org/reports/tortReform/CollateralSourceRule.asp> (last visited July 24, 2007). Note that according to Kevin S. Marshall and Patrick W. Fitzgerald, forty-four states have enacted legislation allowing for the consideration of the payment of collateral source benefits. Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral Source Rule and Its Abolition: An Economic Perspective*, 15 KAN. J.L. & PUB. POL'Y 57, 61 app.1 (2005) (arguing that tort reform designed to undermine the collateral source rule is the product of defense-oriented public interest group lobbying and has resulted in arbitrary wealth transferring legislation that not only undermines the legitimate purposes of tort law, namely, compensation, indemnity, restitution and deterrence, but is economically unsound).

²⁴³ *See, e.g.*, NAT'L ASS'N OF MUT. INS. COS., NON-ECONOMIC DAMAGE REFORM, <http://www.namic.org/reports/tortReform/NoneconomicDamage.asp> (last visited July 24, 2007).

²⁴⁴ *See, e.g.*, NAT'L ASS'N OF MUT. INS. COS., PUNITIVE DAMAGE REFORM, <http://www.namic.org/reports/tortReform/PunitiveDamage.asp> (last visited July 24, 2007).

²⁴⁵ *See, e.g.*, FEINMAN, *supra* note 9, at 40-46. Medical malpractice reform is one very significant area of regressive reform. Nockleby & Curreri believe that reform efforts in this area can be traced to the abandonment of the locality rule of practice which undermined the "conspiracy of silence" by holding doctors to a national standard of care. Nockleby & Curreri, *supra* note 1, at 1023.

included legislation that increases the plaintiff's burden of proof in order to receive punitive damages.²⁴⁶ As Michael L. Rustad explains:

Forty-five out of the fifty-one jurisdictions either do not recognize punitive damages or have enacted one or more restrictions on the remedy since 1979. These reforms include capping punitive damages, bifurcating the amount of punitive damages from the rest of the trial, raising the burden of proof, allocating a share of punitive damages to the state, and restricting use of evidence of corporate wealth. The handful of jurisdictions that have yet to enact tort reforms are mostly punitive damages cold spots rather than tort hellholes.²⁴⁷

All of these mechanisms undermine achievements from the 1960s and 1970s, which made it easier for relatively weak and unorganized victims to organize and to access justice to vindicate their rights. They undermine the deterrent effects of tort law, designed to keep consumers safe and hold those who profit from placing dangerous products into the stream of commerce responsible for those products. These changes benefit the few, at the expense of the majority of Americans.

d. "Silent Tort Reform:"²⁴⁸ *administrative preemption of state tort law*

One of the most recent, and undemocratic, developments in tort reform has been the use of administrative regulations to preempt state tort law. A recent panel at the South Eastern Association of Law Schools Annual Meeting in 2007 aptly described the issue when it stated: "Unable to achieve tort reform through legislation, the Bush Administration has engaged in a concerted effort

²⁴⁶ See, e.g., JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE § 4:60 (3rd ed. 2006) (Westlaw). See also 22 AM. JUR. 2d *Damages* § 706 (requiring clear and convincing evidence and, in some jurisdictions, proof beyond a reasonable doubt).

²⁴⁷ Rustad, *supra* note 40, at 1300.

²⁴⁸ Stephan Labaton, 'Silent Tort Reform' Is Overriding States' Powers, N.Y. TIMES, Mar. 10, 2006, at C5 (arguing that Bush's administrative officials are promulgating regulations to preempt state law regarding safety standards and liability for safety standards). Labaton has also reported on Bush's attempt to nominate Michael Baroody, executive vice president and top lobbyist of the National Association of Manufacturers (NAM), to head the Consumer Product Safety Commission (CPSC). Stephan Labaton, *Bush Asked to Reconsider Safety Nominee*, N.Y. TIMES, May 18, 2007, at Late Edition—Final, § A, at 23. NAM is the largest trade association for manufacturers, and thus appointing Baroody to head the commission would be like putting the fox in charge of the henhouse. Or as the opposition put it, "If you want to guard the interests of the hens, you don't put the fox in charge of the henhouse," Senator Bill Nelson (D-FL), *quoted in* Kathy Schalch, *Baroody Withdraws Nomination for Top CPSC Spot*, NPR.org, May 23, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=10362433>.

to achieve the same end through the administrative process.”²⁴⁹ The panel²⁵⁰ and Catherine Sharkey in her recent article on “Preemption by Preamble”²⁵¹ notes that the Food and Drug Administration (FDA),²⁵² the Consumer Product Safety Commission (CPSC) and the National Highway Traffic Safety Administration (NHTSA) have all included language in recent rules or proposed rules that claim to preempt state law.²⁵³ All three agencies deal with product safety: prescription drug labeling by the FDA, fire resistance standards for bedding and mattresses by the CPSC²⁵⁴ and crush resistance standards for roofs on sport-utility vehicles by the NHTSA.²⁵⁵

Sharkey warns that these examples could be just the tip of the iceberg if regulatory agencies start placing preemption clauses in all of their rules and regulations.²⁵⁶ Consistent with part B, below, Sharkey also notes that, while the federal courts are deferential when it comes to agency claims for preemption, they are not deferential to those agencies when it comes to implying private rights of action.²⁵⁷ This could result in the complete substitution of public remedies for private remedies (i.e. the evisceration of private causes of action in these areas).²⁵⁸

The problem with preemption through regulation is threefold. First, preemption in these cases interferes with the states’ ability to regulate for the

²⁴⁹ SOUTH EASTERN ASSOCIATION OF LAW SCHOOLS ANNUAL MEETING, July 29-Aug. 4, 2007, program at 12, available at <http://www.nsulaw.nova.edu/seals/program%2007July10.pdf>.

²⁵⁰ *Id.*

²⁵¹ Sharkey, *supra* note 225, at 227-28.

²⁵² Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601).

²⁵³ Sharkey, *supra* note 225, at 227-28.

²⁵⁴ Final Rule: Standard for the Flammability (Open-Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496 (Mar. 15, 2006) (to be codified at 16 C.F.R. pt. 1633).

²⁵⁵ Federal Motor Vehicle Safety Standards: Roof Crush Resistance, 70 Fed. Reg. 49,223, 49,247-48 (proposed Aug. 23, 2005) (to be codified at 49 C.F.R. pt. 571).

²⁵⁶ Sharkey, *supra* note 225, at 227-28.

²⁵⁷ *Id.* at 228-29, 245-50. Sharkey noted that perhaps the Supreme Court would clarify its doctrine with regards to deference in preemption cases in *Watters v. Wachovia Bank, N.A.*, 126 S. Ct. 2900 (2006). The Court has since decided *Watters*. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007) (upholding the preemption of Michigan mortgage lending laws by regulations promulgated by the Office of the Comptroller of the Currency (OCC) that state subsidiaries of national banks are subject to the superintendence of the OCC and this preempts state regulation). Needless to say the 5-3 decision with Justice Stevens, the Chief Justice and Justice Scalia joining in dissent is consistent with the deferential approach to preemption through regulation. Although the majority never addresses the issue of *Chevron* deference head on, it appears to have upheld the Sixth Circuit’s decision to uphold the district court’s use of the *Chevron* standard. *Id.* at 1566. The dissent went to some length to argue that the *Chevron* standard of deference was not appropriate in this case and even if the *Chevron* standard was used the OCC’s justification would fail the standard. *Id.* at 1584-85 (Stevens, J., dissenting).

²⁵⁸ Sharkey, *supra* note 225, at 239.

safety and well-being of its citizens by placing a federal ceiling on those protections and immunizing potential wrongdoers from suit in state court under state law. Secondly, the federal agencies that are empowered to police these areas of product safety are often understaffed and/or unable to respond to new safety risks.²⁵⁹ Finally, agency preemption without congressional mandates is not transparent or democratic. They constitute “silent tort reform” and “backdoor federalization.”²⁶⁰

e. Illegal Americans revisited

It should come as little surprise that there has been regressive tort reform at the federal level in the area of prison litigation that achieves all three goals, i.e. making it harder for prisoners to get into court, making it more difficult to win once they are there, and restricting damage recoveries for them when they do win.²⁶¹ As criminologist James Robertson notes:

The [Prison Litigation Reform Act] constrains inmates by requiring them to exhaust administrative remedies before bringing suit; pay filing fees; and forgo damages for emotional injuries absent a prior physical injury. While the Act permits the judiciary to sua sponte dismiss claims failing to state a cause of action, its power to grant prospective relief cannot extend beyond correcting the right in question; and the relief can be terminated

²⁵⁹ In addition to the Broody incident mentioned above, the CPSC is understaffed and has been unable to act under its full powers since the summer of 2006 because it requires three commissioners to make certain decisions and issue subpoenas. Darryl Forten, *CPSC Falling Apart, Our Safety At Risk*, AMERICAN CHRONICLE, Apr. 23, 2007, available at <http://www.americanchronicle.com/articles/viewArticle.asp?articleID=25097>. According to Forten, “The CPSC originally had 786 full time employees when it began over 30 years ago. Currently there are only 420 full time employees, which will likely be cut to 401 employees in 2008.” *Id.* For the view that the EPA is understaffed and underfinanced, see Alexei Barrionuevo, *Food Imports Often Escape Scrutiny*, NY TIMES, May 1, 2007, available at <http://www.nytimes.com/2007/05/01/business/01food.html?ex=1186459200&en=a7d1933f633c387c&ei=5070>. A recent article notes that 24 states enacted recalls of potentially dangerous tires from China before waiting for NHTSA to act. Mark Huffman, *States Recall Chinese Tires: Federal Recall Stalled as Importer Runs Low on Cash*, Aug. 7, 2007, available at http://www.consumeraffairs.com/news04/2007/08/china_tires05.html. (arguing that the states were, once again, out in front of the federal government when it came to safety).

²⁶⁰ See, e.g., Labaton, *supra* note 248; Sharkey, *supra* note 225, at 228 (referring to Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006)). Although Sharkey posits a range of mechanisms at agencies and courts’ disposal that could “harness this development in service of transparency and . . . accountability,” the system as it stands “is in sharp tension with the conventional notion of a democratically accountable broadly representative body (e.g. Congress) taking the lead in politically charged areas that implicate balance of federal-state relations.” Sharkey, *supra* note 225, at 229, 259.

²⁶¹ Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321.

within two years or, in some instances, sooner. In addition, the Act caps fees for attorneys and special masters.²⁶²

These reforms severely limit the rights of victims to have access to justice and to be compensated for the violation of their rights. The extent of the limits placed on prisoners, the most vulnerable and politically disempowered minority population in America, is particularly troubling. It is the most drastic demonstration of the symbiotic relationship between the loss of political equality and the further erosion of rights through regressive tort reform.

B. The role of the Supreme Court in regressive tort "reform"

For the greater part of the history and evolution of American tort law, the U.S. Supreme Court has not been a central actor. Few, if any, of the major advances in tort law during the 1960s and 1970s are credited to that institution.²⁶³ This is because tort law is traditionally either a part of state common law or state and federal statutory law. Heavy involvement by the Supreme Court in either of these areas raises the possibility of activism, either in the form of the Court overstepping boundaries based on federalism concerns, or based on separation of powers concerns. Of course, it may be contended that either the states or Congress has overstepped, rather than the Supreme Court. In either event, significant legal change in the area of civil litigation and torts at the Supreme Court level signals that something more significant than the normal ebb and flow of state-based tort reform initiatives is afoot. While the wave of tort reform, beginning in the 1980s, is not generally credited to the Supreme Court,²⁶⁴ the Court has played a very strong supporting role in that movement, both in its rhetoric²⁶⁵ and in its decisions during the last two decades. The Court has had a significant impact on the broader category of civil litigation, and this impact is commensurate with regressive tort reform in general. The Supreme Court has, in effect, put its imprimatur on the movement.

Andrew Siegel, in a careful and thorough piece, paints a picture of the Rehnquist Court as a Court with an overarching hostility to litigation.²⁶⁶ As

²⁶² James E. Robertson, *The Jurisprudence of the PLRA: Inmates as "Outsiders" and the Countermajoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187, 188-89 (2002). President William Clinton signed this bill into law.

²⁶³ See, e.g., Rustad & Koenig, *supra* note 21, at 105 app.1. The notable exception is in the area of the First Amendment.

²⁶⁴ Most of it has been carried out state by state through legislation and in their courts. See, e.g., FEINMAN, *supra* note 9, at 44.

²⁶⁵ Note the many jibes, mainly coming from Justice Scalia, in the cases limiting the ability of plaintiffs to seek relief in the courts. Siegel, *supra* note 29, at 1124 n.102. Note also the rhetoric in the punitive damages cases of damages "run[ning] wild." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

²⁶⁶ Siegel, *supra* note 29, at 1097. Although Siegel is not the first to identify this attitude, he is the first to draw it out as an overarching theme of the Court. For earlier, more partial references to

Siegel states, “[i]n case after case and in wildly divergent areas of the law, the Rehnquist Court has expressed a profound hostility to litigation.”²⁶⁷ Siegel’s point is not to dismiss the voluminous existing explanatory narratives of the Court, such as federalism, conservatism, or even judicial supremacy, but to show that they are incomplete and misleading without an understanding of the Court’s hostility to litigation.²⁶⁸

This hostility is not an even-handed hostility to all litigants alike. It manifests itself most prominently to the disadvantage of plaintiffs, and common people, and to the advantage of defendants and legal fictions, namely states and other corporate entities.²⁶⁹ Siegel finds it curious that this hostility coexists with “the Court’s concurrent commitment to an aggressive form of judicial supremacy,”²⁷⁰ and he explores a range of explanatory vectors, not least of which is the strong correlation between a conservative social vision and the cases in which the Court has shown the most hostility to litigation, as well as when it seems to most zealously promote its own supremacy.²⁷¹ Other explanatory vectors include an oversimplified view of separation of powers,²⁷² and the structure and sociology of the American legal profession, within which there is a tendency for the best-trained and best-connected lawyers (including the members of the Court and their associates) to congregate in civil defense and constitutional litigation rather than in personal injury.²⁷³

The democracy-based explanation, which is not directly pursued by Siegel, but which is consistent with both Supreme Court elitism and certain aspects of a conservative social vision, is that the Court lacks sufficient concern for democratic values. The point is not to simply trot out the old hobby horse of counter-majoritarianism (i.e., the Court is an activist Court with little respect for

the idea, see Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L. J. 691, 706-19 (2000) (identifying “hostility to litigation” as one of the themes behind the Court’s 1999 sovereign immunity decisions).

²⁶⁷ Siegel, *supra* note 29, at 1107. While this Article tracks Siegel’s treatment of the Court’s hostility to litigation, the treatment below focuses on how that hostility translates into undermining democratic values.

²⁶⁸ *Id.* at 1102.

²⁶⁹ As Siegel notes, “Any survey of the Rehnquist Court’s hostility to litigation, however cursory, must begin with the obvious: In myriad ways, the Court has made life very difficult for civil plaintiffs.” *Id.* at 1117. Siegel notes that while the court is generally hostile to litigation, it treats “plaintiffs’ litigation” as particularly “demeaning and disreputable.” *Id.* at 1201.

²⁷⁰ *Id.* at 1098.

²⁷¹ *Id.* at 1199-1200.

²⁷² *Id.* at 1200-01. Although Siegel sees this as one possible explanatory vector, he notes that it is not an explanation that is consistent with a number of the court’s decisions. *Id.* at 1201 n.458 (referring to the discussion in the article’s text accompanying footnotes 109-10. The implausibility of this explanation is further explored below).

²⁷³ *Id.* at 1202.

other democratic institutions),²⁷⁴ but that many of the Court's decisions undermine democratic accountability and fail to accord equal concern and respect for everyone who is affected by its decisions.

Those cases, which evidence the Court's hostility to litigation, most directly include cases involving the Court's reluctance to provide remedies for those persons whose rights have been violated, official immunity and fee-shifting statutes cases, punitive damages cases, and cases that involve the Federal Arbitration Act and state sovereign immunity cases.

1. Constricting remedies

A number of authors have commented on the Court's constriction of remedies for those whose rights have been violated.²⁷⁵ Andrew Siegel, who analyzes four paradigm cases,²⁷⁶ out of many,²⁷⁷ in which the Rehnquist Court has undermined the traditional view that rights imply remedies for their violation,²⁷⁸ notes that, in every case, there was an acknowledged or assumed injury to a defined legal interest and a Supreme Court precedent supporting relief.²⁷⁹

²⁷⁴ See, e.g., Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 495 (2002); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 130 (2001). Note that courts are not categorically counter-majoritarian. Given the evidence above concerning the "representative" branches and Richard Abel's work, there is no reason to think that the courts are less likely to provide democratically justifiable decisions in the area of torts. Abel, *supra* note 37.

²⁷⁵ See Goldberg, *supra* note 15; Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343 (2002); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003); Christopher J. Roederer, *Another Case in Lochner's Legacy, The Court's Assault on New Property*, 54 DRAKE L. REV. 321, 341-42, 342-351, 360 (2006).

²⁷⁶ *Alexander v. Sandoval*, 532 U.S. 275 (2001) (finding that no private right of action exists to enforce the disparate impact regulations barring entities who receive federal funds from adopting policies that have the "effect" of discriminating on the basis of race); *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61 (2001) (private remedy for a Constitutional right violation is not available for a federal prisoner held in a private correctional facility in a claim against the corporation for violation of the Eighth Amendment's prohibition on "cruel and unusual punishment."); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (holding that a remedial provision of the Employee Retirement Income Security Act of 1974 (ERISA) does not provide a right of recovery); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (holding that private individuals harmed by violations of the Family Educational Rights and Privacy Act of 1974 (FERPA) cannot seek redress under 42 U.S.C. § 1983).

²⁷⁷ Siegel lists several cases but does not include *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (dismissing respondent's case for failing to establish that she had a property right in the enforcement of a mandatory restraining order, thereby failing to establish that she had a right that was worthy of procedural due process protection which would provide a right to sue under 42 U.S.C. § 1983).

²⁷⁸ Siegel, *supra* note 29, at 1118-29.

²⁷⁹ *Id.* at 1122.

The Court, at times, attempts to justify these decisions on democratic grounds.²⁸⁰ Siegel phrases the Court's democratic justification in terms of ensuring that coercive sanctions are not imposed without careful communal deliberation.²⁸¹ This line of argument is rooted in separation of powers concerns, namely concerns that the courts should not encroach on the prerogatives of representative institutions to make the law and determine whether there should be remedies for the breach of law.²⁸² In a number of these cases, the Court appears to engage in a dialogue with Congress and/or the states, imploring them to speak more clearly, if they wish to create private remedies.²⁸³

However, this explanation of the Court's decisions is undermined by the Court's assault on § 1983 claims. That assault is in direct conflict with the spirit and the letter of § 1983, under which Congress explicitly provided for the right to a remedy for the violation of federal law, including constitutional law.²⁸⁴ This is evidenced, not only by some of the cases mentioned above, including *Gonzaga*²⁸⁵ and *Castle Rock*,²⁸⁶ but also in § 1983 cases where the court has expanded official immunity from damages and made it harder to recoup attorneys' fees.²⁸⁷ These decisions fly in the face of democratic concerns, not only by undermining "democratically" passed legislation, but also by undermining mechanisms designed to help consolidate and protect democratic rights.

A similar pattern is found in the Court's expansion of the doctrine of qualified immunity over the last twenty years, which has resulted in more stringent standards for determining a clearly established right, as well as greater tolerance for errors of judgments on the part of officials claiming the immunity.²⁸⁸

²⁸⁰ *Id.* at 1129.

²⁸¹ *Id.*

²⁸² Siegel refers to *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67-69 (2002), which discusses a number of cases limiting remedies to civil litigants on the grounds of separation of powers. Siegel, *supra* note 29, at n.119.

²⁸³ Siegel refers to *Gonzaga University v. Doe*, 536 U.S. 273, 280-81 (2002) (describing the need for congress to speak clearly of its intention to create a private remedy). Siegel, *supra* note 29, at 1129 n.119. See also *Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (quoting Colo. Rev. Stat. § 18-6-803.5(a)-(b) (1999)). It is questionable whether the Court in *Castle Rock* was genuine. See Roederer, *supra* note 275, at 341-42, 342-51, 360.

²⁸⁴ Oddly, the Court uses arguments and policy drawn from implied right of action cases (under which separation of powers concerns justifiably act to limit the court in creating rights of action) to limit § 1983 claims. This is odd because § 1983 was specifically enacted to provide rights of action, and thus, the Court is undermining the separation of powers when it denies such claims. See Siegel, *supra* note 29, at 1126; Roederer, *supra* note 275, at 321-69.

²⁸⁵ *Gonzaga Univ.*, 536 U.S. at 273.

²⁸⁶ *Castle Rock*, 545 U.S. at 748.

²⁸⁷ See Siegel, *supra* note 29, at 1126, 1130.

²⁸⁸ *Id.* at 1130-31 n.123 (collecting cases involving the doctrine). See *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). But there are a handful of cases where the Court has limited overly expansive interpretations/applications of immunity by circuit courts. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (holding that the circuit court erred in applying a "rigid gloss" to the qualified immunity standard that denied relief to tort plaintiffs if there was no prior case with

The result is that it is harder in these cases for victims, who have had recognized rights violated, to vindicate those rights.²⁸⁹

2. Access to fee-shifting

Fee-shifting legislation constituted a very important and progressive development for civil litigants, as it allowed them to claim attorney's fees when they prevailed in their cases.²⁹⁰ This development accompanied the Civil Rights Act of 1964 and was later incorporated into the Civil Rights Attorney's Fees Act of 1976. That reform helped to ensure that the rights won on paper, and which evidence the coming of age of American democracy, could actually be vindicated in practice. It not only made it easier for victims to obtain counsel, bring claims, and receive remedies for the wrongs they suffered, but it had the further purpose and effect of keeping those hard-won democratic gains on track. Plaintiffs in these cases are not merely vindicating private wrongs, but helping to vindicate and deter public wrongs.

Again, however, the Rehnquist Court whittled away at this mechanism for vindicating those rights by narrowing down the class of "prevailing plaintiffs" and by devaluing the importance of having the Constitution itself, and one's rights under the Constitution, vindicated. In other words, devaluing constitutional rights is not merely the result of whittling away mechanisms for vindicating rights; more importantly, it is also a means through which it is achieved. The Court denied "prevailing party" status to plaintiffs in cases where: the court's decision that the plaintiffs' rights had been violated was not entered into a formal declaratory judgment or injunction, when the judgment did not provide a "substantial benefit" to the claimant, when the claimant receives only nominal damages, and/or when the claimant's suit compels the abandon-

"materially similar" facts where a constitutional violation had been established); *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (unanimously holding, contrary to the position of a number of circuits, that an order denying summary judgment in a qualified immunity case because of uncertainty about the factual sufficiency of the allegations was not immediately appealable).

²⁸⁹ Siegel, *supra* note 29, at 1131-32. See, e.g., Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 482-84 (2002); Jackson, *supra* note 266, at 691, 706, 707 (locating the Supreme Court's 1999 sovereign immunity decisions in the context of a variety of other anti-litigation initiatives of the Rehnquist Court and offering the Court's "hostility to litigation" as one of many overlapping themes motivating those decisions). David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989) (arguing that the doctrine is based on right wing judicial activism). The push for the immunity of corporate entities is not confined to the state. FEINMAN, *supra* note 9, at 33-34.

²⁹⁰ See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243, tit. II & tit. VII. See, e.g., Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1622, 1623, 1636; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; Siegel, *supra* note 29, at 1136.

ment of an illegal practice or rule, but is not accompanied by a binding judicial decree.²⁹¹

These cases appear to deny the congressionally mandated relief on rather narrow and technical grounds, which are not supported by the separation of powers or the democracy-reinforcing purposes of the provisions themselves. The cases, which narrowly read “prevailing party” to exclude those whose rights are vindicated but whose damages are nominal or insubstantial, completely undervalues the federal and constitutional rights these provisions were designed to help safeguard. The fact that money damages are inadequate or inappropriate in some of these cases, or that specific performance is more appropriate, does not mean that a vindication of the right is less important or less valuable. It demeans the legislation, and the rights it was designed to protect, to act as if it was designed to only protect losses that could be, or are, converted into money damages. Further, to deny the shifting of fees in these cases does the most damage to the purpose of the legislation, which was to encourage these types of suits.²⁹² This is because it is exactly in those cases, where there are few monetary damages, that it will be most difficult for plaintiffs to secure adequate legal representation. Without monetary damages or fee-shifting, the plaintiffs incur the attorney’s fees.

3. Punitive damages

The Supreme Court has also weighed in on punitive damages. The Rehnquist Court, unlike any Court before, sought to limit the availability of punitive damages. Siegel is correct to point out that punitive damages are something of a lightning rod for tort reform advocates, yet he is incorrect to think that this is because they “represent a substantial share of the costs of our current regime.”²⁹³ Punitive damages are in fact very rare,²⁹⁴ and although awards may

²⁹¹ See, e.g., *Buckhannon Bd. & Care Home v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 605 (2001); *Farrar v. Hobby*, 506 U.S. 103, 115 (1992); *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988) (per curiam); *Hewitt v. Helms*, 482 U.S. 755, 759-60 (1987); Siegel, *supra* note 29, at 1137.

²⁹² See *Kay v. Ehrler*, 499 U.S. 432, 436 (1991).

²⁹³ Siegel, *supra* note 29, at 1148. See, e.g., Rustad & Koenig, *supra* note 21, at 60-65; Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263 (2006) [hereinafter Eisenberg et al., *State Courts*], available at <http://ssrn.com/abstract=912309>. As Eisenberg has stated elsewhere, “[m]isperceptions about juries and punitive damages are especially strong. Contrary to popular belief, juries rarely award such damages, and award them especially rarely in products liability and medical malpractice cases. Rather, juries tend to award punitive damages in intentional misconduct cases. When juries do award punitive damages, they do so in ways that relate strongly to compensatory awards.” Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002) [hereinafter Eisenberg et al., *Empirical Study*].

²⁹⁴ Eisenberg found that judges award punitive damages in about 4% of decided cases and juries in about 5% of decided cases. Eisenberg et al., *State Courts*, *supra* note 293, at 268. How-

be extreme in some cases, the numbers are insignificant in light of the vast majority of cases.²⁹⁵

The changes in this area have moved from requiring certain procedural safeguards to substantively limiting the amount of damages.²⁹⁶ Not unlike the fee-shifting limitation, here, the Court is pegging its substantive limits on compensatory damages,²⁹⁷ thus, making cases that do not involve high levels of economic damages harder to bring.²⁹⁸ Again, similar to the fee-shifting cases, limiting punitive damages, particularly in this fashion, reduces the efficacy of punitive damages as a way of deterring the egregious behavior of defendants. Whereas above, the Court undermined the role that fee-shifting played in securing federal and constitutional rights, here, limitations on punitive damages also limits the public policy role that punitive damages play in deterring some of the worst forms of corporate irresponsibility.²⁹⁹

ever, given that these numbers reflect cases in which plaintiffs win, they only represent about half of all cases tried, and since less than 5% of cases go to court, while the rest settle, this makes the number of punitive damages cases quite de minimus (below 3 in 10,000).

²⁹⁵ Eisenberg's study indicates that most cases involve awards of under \$100,000 (60%); over 23% are under \$10,000, and less than 11% are over \$1 million. *Id.* at 270.

²⁹⁶ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (striking down a damage award as excessive); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 426, 443 (2001) (holding that appellate courts should review trial court determinations as to the constitutionality of punitive damage awards de novo); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996) (striking down a damage award as excessive); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994) (holding that the lax standard for appellate review of punitive damages mandated by the Oregon Constitution violated the Due Process Clause of the Fourteenth Amendment); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 446, 465-66 (1993) (reviewing a punitive damage award for excessiveness but finding it within constitutional limits); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (reviewing both Alabama's method of assessing punitive damages and the magnitude of an award in a particular case but finding no constitutional problem); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60 (1989) (holding that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damage awards and declining to set aside a punitive damage award as excessive); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988) (discussing but declining to answer on prudential grounds major constitutional questions regarding punitive damage awards); Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1 (2004). Another punitive damages case, *Philip Morris USA v. Williams* (05-1256), is before the Supreme Court this term.

²⁹⁷ In *Campbell*, although the Court would not make a bright line ratio, it stated that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." 538 U.S. at 410. However, the Court did note that "ratios greater than those that this Court has previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages . . ." *Id.* (citing *Gore*, 517 U.S. at 582).

²⁹⁸ Siegel, *supra* note 29, at 1147.

²⁹⁹ See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 355 (2003); DAN B. DOBBS, *THE LAW OF TORTS* § 381 (2000); FEINMAN, *supra* note 9, at 42-46. Siegel notes that the Court is particularly hostile to litigation in cases where litigation is meant to achieve greater societal purposes. Siegel, *supra* note 29, at 1160 n.255.

4. Arbitration clauses

The Court has also gone out of its way to broadly construe the Federal Arbitration Act.³⁰⁰ Arbitration, or contracting out of court, is one way of circumventing an institution that is unresponsive to special interest pressures. There may be a tendency to think that, since arbitration is a form of alternative dispute resolution, it is thereby progressive.³⁰¹ At the very least, some might think that it is no less progressive than regular litigation and should be given equal footing. Although the Court's recognition of arbitration may have begun as an effort to put arbitration on an equal footing with litigation, it has ended up as "a policy-driven assault on the wisdom and propriety of litigation as a mechanism for resolving such disputes."³⁰² There is little question that arbitration has its benefits, particularly in terms of costs to the parties. For equal-bargaining partners, arbitration may, in fact, be superior to litigation.

The Court's practice, however, has been to ignore the bargaining disparities of the parties. As Siegel states, "[i]t has consistently enforced form arbitration agreements that shift cases from courts to alternative forums without regard for the practical consequences to potential plaintiffs."³⁰³ There are at

³⁰⁰ Siegel, *supra* note 29, at 1117-18.

³⁰¹ As Garth notes, "mandatory arbitration . . . gained support from idealistic academic studies . . . promoting 'procedural justice.' The idea was that arbitration allows individuals to tell their stories, and therefore litigants perceive the process as a more legitimate form of justice than the usual result of litigation—a negotiated settlement. Both mediation and arbitration contain a tradition—now seemingly muted—that the results are supposed to be better than strict enforcement of the law." Garth, *supra* note 204, at 929.

³⁰² Siegel, *supra* note 29, at 1141.

³⁰³ Siegel, *supra* note 29, at 1117-18. The literature critiquing the Court on this point is vast. See e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996) (arguing that the Supreme Court's arbitration jurisprudence will allow "birds of prey" to "sup on workers, consumers, shippers, passengers, and franchisees"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (1997) ("The Supreme Court has created a monster."); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) (critiquing arbitration case law for increasingly favoring arbitral forums without regard for basic fairness or rule of law norms). See also Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293 (1999); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039 (1998); David M. Kinnecome, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?*, 79 B. U. L. REV. 745 (1999); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998); Margo E. K. Reder, *Arbitrating Securities Industry Employment Discrimination Claims: Restructuring a System to Ensure Fairness*, 2 U. PA. J. LAB. & EMP. L. 19 (1999); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Bind-*

least five significant effects of allowing companies to bind consumers (and smaller, less powerful companies) to arbitration. First, the large company gets to choose a venue that is more congenial.³⁰⁴ Second, it gets a forum that has less due process than a court³⁰⁵ (e.g., in terms of discovery, the right to a jury,³⁰⁶ and judicial review).³⁰⁷ Third, it can oust the possibility of punitive damages.³⁰⁸ Fourth, it can eliminate the possibility of victims joining together in class actions to bring a suit.³⁰⁹ Finally, as Richard Posner states, parties are not entitled to awards that are “correct or even reasonable, since neither error nor clear error, nor even gross error is a ground for vacating an award.”³¹⁰ All of these factors benefit the few, at the expense of the majority. As Bryant Garth, Dean at Southwestern Law School, suggests:

It is not the simplistic bias of decision-making structured for the employers or companies to win. Instead, the bias is found in a system in which only a few constituencies are comfortable making their arguments and confident that their concerns will be understood, even if they lose some cases. The bias is also in a

ing Arbitration, 74 WASH. U. L. Q. 637 (1996); Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831 (2001).

³⁰⁴ See, e.g. *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing a venue provision in an arbitration clause written in fine print on the cruise ticket that was significantly more congenial and convenient for the Cruise Lines than for the consumer plaintiff).

³⁰⁵ “Just as important to anyone concerned with the morality of law is the fact that the arbitrator can decide a case without regard for the law or the facts in a case. There is no predictable outcome, no procedural protection.” Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 *TOURO L. REV.* 1205, 1236 (2000). See also Garth, *supra* note 204.

³⁰⁶ This arguably undermines one of the main democratic components of our system of justice (both civil and criminal).

³⁰⁷ Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards under the Federal Arbitration Act: Striking the Right Balance*, 44 *Hous. L. Rev.* 739 (2007).

³⁰⁸ See Stephan J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 *Fordham L. Rev.* 529, 531 (1994).

³⁰⁹ Eliminating class actions means that many consumers with small harms simply will not pursue claims, thereby allowing business to defraud large numbers of consumers in small amounts. FEINMAN, *supra* note 9, at 104. It is only through joining as a class that they can in any way approximate the power of big business. *Id.* at 80. See also Post, *supra* note 305, at 1226. In *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997), Judge Easterbrook upheld an “arbitration agreement” that was not negotiated, but simply shipped with the plaintiff’s computer binding the plaintiff/consumer to its terms unless the consumer shipped the computer back to the manufacturer at the consumer’s own cost within 30 days (a rolling shrink wrap contract); FEINMAN, *supra* note 9, at 88. This is just one way of forming binding contracts with little to no notice, much less bargaining. In addition to the normal boilerplate adhesion contract, others include shrink-wraps, browse-wraps and click-wraps in which the agreement is packaged with the product, put on a website or on the computer screen to click. *Id.* at 86.

³¹⁰ *IDS Life Ins. Co. v. Royal Alliance Assocs.*, 266 F. 3d 645, 650 (7th Cir. 2001).

process that selects neutrals who will be safe for the leading lawyers and clients—whoever controls the selection—and rejects those who appear too political, too unreliable, or too risky even on the basis of cultural stereotypes.³¹¹

This is as undemocratically tailored as a justice system can be. It is perfectly suited for employers and companies who are repeat players, but everyone else must simply take it or go without.³¹² Deborah Post, in describing the Seventh Circuit Court case of *Hill v. Gateway 2000, Inc.*,³¹³ stated:

The Gateway case . . . threatens the democratic process on two levels. Not only does it create a model of contract formation that gives entire control over the terms of the agreement to one side, it also deprives the less powerful party, the individual consumer, of the only mechanism she has to directly confront behavior that is predatory, abusive or simply overreaching.³¹⁴

5. States rights

One of the most dramatic areas of constitutional change has been in the area of “states rights.” The Court has brought new life to state sovereign immunity in a host of cases, through a diverse set of mechanisms.³¹⁵ The result, as with many of the cases above involving rights of action, qualified immunity, and arbitration, is that colorable claims are dismissed without regard for their

³¹¹ Garth, *supra* note 204, at 933.

³¹² Just as the Court abandoned its fidelity to separation of powers, the Court here abandons its fidelity to federalism when it comes into conflict with its desire to limit access to the courts through the FAA. Siegel, *supra* note 29, at 1142-43. See e.g., *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (holding that the FAA preempts state law protecting access to courts in wage collection actions).

³¹³ 105 F.3d 1147.

³¹⁴ Post, *supra* note 305, at 1235.

³¹⁵ Siegel, *supra* note 29, at 1153-55 nn.219-28. Siegel summarizes the area: “[T]he Court has reaffirmed and firmly constitutionalized the expansive and counter-textual reading of the Eleventh Amendment . . . , held that Congress may not abrogate states’ Eleventh Amendment immunity under any of its Article I powers, developed a fairly intrusive test to determine whether Congress has properly abrogated the states’ immunity pursuant to its Fourteenth Amendment powers, and applied that test with increasing rigor and scepticism. At the same time, the Court has—without relying on the Eleventh Amendment or any other textual provision—held that the Constitution’s structure requires that the states be accorded sovereign immunity from suits in their own courts (absent their consent) and from federal administrative proceedings that bear significant indicia of adjudication. In a variety of less well-known cases, the Court has also narrowed the well-established doctrine whereby individuals may, notwithstanding sovereign immunity, seek injunctions against state officials in their official capacity, made it easier for state officials to obtain dismissal of lawsuits on sovereign immunity grounds at an early stage in the litigation process, and overruled precedent suggesting that a state does not possess full Eleventh Amendment immunity when it engages in routine commercial activity.” *Id.* at 1153-54.

merit.³¹⁶ Therefore, victims of illegal government conduct are denied access to justice.³¹⁷ It also means that one important mechanism for holding the government accountable to the people is eroded, and with it, respect for the rule of law.

The justification for the revival of state immunity is a somewhat odd anthropomorphism of the state.³¹⁸ The idea is that states are somehow endowed with sovereignty, the likes of which make them susceptible to moral harm or assaults to their dignity. The concept is a throwback to the days in which Kings and Queens ruled the land, when they were “the sovereign,” wholly capable of suffering indignity at the hands of others. There is considerable debate as to whether or not dignity was the crucial animating idea behind the 11th Amendment and sovereign immunity.³¹⁹ Like many issues in legal history, there is ample authority on both sides and the issue’s resolution is beyond the scope of this Article.

Even if dignity was the original rationale for the 11th Amendment, it was a different notion of dignity than the one called forth by the Court today. The dignity, referred to before, consisted of the notion that sovereigns were equal and that it was inappropriate (or undignified) to subject one sovereign to the courts of another sovereign.³²⁰ This purportedly undermined the equality of sovereigns.³²¹ However, the modern focus is on the indignity of being brought into court (even the state’s own court). While the former view sounded in notions about the equality of sovereigns, if Siegel is correct, the modern notion is not animated by equality, but by a type of elitism which places the state sovereign above its citizens. Siegel notes:

As the Court sees it, compelling an unwilling state to defend a private lawsuit for damages threatens state dignity for much the

³¹⁶ Siegel, *supra* note 29, at 1163.

³¹⁷ *Id.*

³¹⁸ Siegel notes that Justice Thomas has provided the fullest articulation of the dignity principle, that “[t]he preeminent purpose of state sovereign immunity is to accord the States the dignity that is consistent with their status as sovereign entities.” *Id.* at 1157 (citing *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002)).

³¹⁹ Note that the dignity rationale for sovereign immunity was only used sporadically. It came up in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), and then in *Ex parte Ayers*, 123 U.S. 443 (1887). It was only raised again in 1959, where it was not relied upon. *Petty v. Tenn.-Miss. Bridge Comm’n*, 359 U.S. 275, 276 n.1 (1959). As the court pointed out in that case, “More than the dignity of a sovereign state was probably at issue, however. When the Eleventh Amendment was proposed, many states were in financial difficulties and had defaulted on their debts. The states could therefore use the new amendment not only in defense of theoretical sovereignty but also in a more practical way to forestall suits by individual creditors!” *Id.* (quoting MARIAN D. IRISH & JAMES W. PROTHRO, *THE POLITICS OF AMERICAN DEMOCRACY* 123 (1959)).

³²⁰ This was the kind of dignity at play which was rejected by Chief Justice Marshall in *Cohens v. Virginia*. Siegel, *supra* note 29, at 1161.

³²¹ Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003).

same reason and in much the same way that subjecting a private party to such a suit diminishes the dignity and threatens the status of that private party.³²²

In other words, it is part of a visceral reaction to having to defend oneself in court. However, modern states (whether true sovereign states or elements of a federal state system) are artificial entities, similar to corporations and associations, and do not possess the moral qualities needed to have dignity. While the earlier conception of equal dignity of states vis-a-vis other states resonates with democratic impulses (although it too raises concerns in today's global interdependent world),³²³ the modern form of the idea is decidedly undemocratic. It is a throwback to pre-democratic times, when the sovereign made, imposed and was above the law. This is inconsistent with notions of equality before the law. The Court, in effect, is choosing to protect the "dignity" of the state over the rights of plaintiff citizens. It is undermining "the rule of law" and equality before the law, thereby elevating "rule by the sovereign" and undermining democratic accountability.³²⁴

VI. CONCLUSION

Given the findings addressed in Parts III and IV above, there is little hope that this work, or anyone else's academic work, is going to revitalize American democracy on its own. The present downward spiraling cycle will not be easy to reverse, particularly in the "age of truthiness." This is not to say that critical work has no place, or no chance of impact. There is always some hope that the "age of truthiness" will pass and that this piece, like the works of professors Abel, Baker, Feinman and Rustad, among others, will find some traction, and will help to demystify what is at stake in modern tort reform. Demystification is a necessary, although insufficient step, towards transparency, accountability and a revitalized democracy. Although many authors have come close to challenging tort "reform" on democratic grounds, few, if any, have chosen to be so blunt. The arguments in this Article are designed to place the pre-

³²² Siegel, *supra* note 29, at 1160.

³²³ See, e.g., DARREL MOELLENDORF, COSMOPOLITAN JUSTICE (2002) (critiquing John Rawls's statist approach to global justice on Rawlsian grounds).

³²⁴ Although beyond the scope of this paper, the present administration's attack on the rule of law should be noted. The attack has taken many forms since the beginning of the "war on terror," but a few recent examples include the president's abuse of signing statements to selectively enforce the law as well as proposed amendments to the War Crimes Act to insulate government officials from suits based on war crimes committed against detainees. See, e.g., Press Release, American Bar Association, Blue-Ribbon Task Force Finds President Bush's Signing Statements Undermine Separation of Powers (July 24, 2006), <http://www.abanet.org/media/releases/news072406.html>; R. Jeffrey Smith, *Detainee Abuse Charges Feared: Shield Sought From '96 War Crimes Act*, WASH. POST, July 28, 2006, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/07/27/AR2006072701908_pf.html.

sent course of tort “reform” in sharp relief against the unreflective idea that the American ship of state and law has been sailing a steady democratic course for over 200 years. Sometimes it takes a clear sighting of the precipice before people are willing to change course.

A prime example is captured in the American Law Institute Restatement (Third) of Products Liability.³²⁵ Although the reporters’ sincerity is dubious in a number of respects,³²⁶ their “restatement” of the law placed the course of products liability in sharp relief against the path of Section 402A of American Law Institute Restatement (Second) of Torts.³²⁷ Their perhaps overzealous crystallization of the death of strict liability in product design and failure to warn cases (§ 2); the death of the consumer expectations test, and the requirement that the plaintiff prove the existence of reasonable alternative design (§ 2(b)); the nearly complete immunity given to prescription drugs (§ 6(c)); and the pass given to “unavoidably unsafe” products such as drugs, cigarettes and alcohol;³²⁸ made it very clear how much the paths of the two Restatements diverged. They also made it apparent how much was being lost on the path to the Third Restatement from the perspective of consumer protection and corporate responsibility. Whether one thinks the Third Restatement was merely a cold, but brutally accurate, obituary or a politically-motivated attempt to put a bounty on the head of

³²⁵ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

³²⁶ The fact that they attempt to maintain that their restatement is not political, but merely a restatement of existing laws is as hard to accept as their assertion that the choice between the risk-utility approach to products liability and the consumer expectation approach is merely a pragmatic choice, a matter of getting it right, like figuring out the boiling point of water, rather than a choice deeply rooted in political as well as principled considerations of justice. See James A. Henderson, Jr. & Aaron D. Twerski, *What Europe, Japan and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INT’L L.J. 1, 14 (1999).

³²⁷ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

³²⁸ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY. Earlier outlines of the present work included a section depicting the rise of consumer protection and strict liability in democratically accountable Europe and the fall of strict liability and consumer protection in “manufacturer’s accountable America.” Luke Nottage, in his comparative study of products liability in Japan the U.S., E.U., and Australia, depicts EU law as making steady pro-consumer progress from the 1960s to the present, Australia making rather steady progress from the 1960s until about 2000, Japan making very little pro-consumer progress until 1994, when it adopted its Product Liability Law which was modeled on the E.U. directive, and the United States, whose pro-consumer product liability law peaked in the early 1980s and started a rather steep decline until the present. Luke Nottage, *Comparing Product Safety and Liability Law in Japan: From Minamata to Mad Cows – and Mitsubishi*, in PRODUCT LIABILITY IN COMPARATIVE PERSPECTIVE 336 (Duncan Fairgrieve ed., 2005). See also Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective Than the Restatement (Third) of Torts: Products Liability?*, 65 TENN. L. REV. 985, 994 (1998); Josephine Liu, *Two Roads Diverged in a Yellow Wood: The European Community Stays on the Path to Strict Liability*, 27 FORDHAM INT’L L.J. 1940 (2004). Cf. Reimann, *supra* note 67, at 801 (somewhat more cautious about the E.U. being more protective of consumers); Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 TEX. INT’L L.J. 45, 53-61 (1999) (arguing that the E.U. also uses a negligence standard in design and failure to warn cases).

strict liability,³²⁹ it brought the issue out in stark relief. As Ellen Wertheimer notes, “The Third Restatement . . . made it impossible for courts to ignore what they had done, and many did not like what they saw.”³³⁰

Once the dust settled, the courts realized that the risks and losses did not go away, but simply shifted. In fact, those risks and losses were shifted onto the shoulders of innocent consumers, who are not only at a disadvantage from the perspective of making products safer, but who also are not equally equipped to insure for, absorb or spread the losses they suffer.³³¹ Although the campaign to see the corporate producer as the symbol of American freedom—like a mustang tethered to a shrub in the desert of welfarist tort law, being fed upon by greedy parasitic lawyers and consumers—persists,³³² the reality is that, when horses run wild, people get trampled. Under the Third Restatement, those who trample now have a much better chance at avoiding responsibility and liability for those losses, even though they: 1) profit from putting their products into the stream of commerce; 2) are best placed to test and make products safe or warn of their hazards; and 3) are in the best position to insure against, absorb and spread the risks and losses. This not only raises the risk of being trodden upon (by undermining the deterrent effect of products liability law), but it also raises the risk that once trodden upon, the consumer will bear the loss.

³²⁹ See FEINMAN, *supra* note 9, at 40. The idea that § 2(b) represents a wish list for manufacturers has been repeatedly cited since it was first stated by Frank Vadall in 1997. See, e.g., *id.*; Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1727 n.116 (2003) (citing *Green v. Smith & Nephew AHP, Inc.*, 629 N.W. 2d 727, 751 n.16 (Wis. 2001) (quoting Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Product Liability section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261, 261 (1997))); Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, the Third Restatement, and the Reinstatement of Liability Without Fault*, 70 BROOK. L. REV. 889, 927 n. 116 (2005); Aaron Arnold, Note, *Rethinking Design Defect Law: Should Arizona Adopt the Restatement (Third) of Torts: Products Liability?*, 45 ARIZ. L. REV. 173, 174 (2003).

³³⁰ Wertheimer, *supra* note 329, at 923. She does note that some courts did follow the Third Restatement, even though it conflicted with earlier precedent. *Id.*

³³¹ As Reimann notes, “[i]n the United States, accident victims are not nearly protected comprehensively. In 1997, 16% of all Americans and 37% of the low-income population had no health coverage at all, and the number kept rising. Only 66% of the adult workforce has disability benefits, and these benefits are usually less than ample. All States have enacted workers compensation schemes but the compensation they pay is fairly low and often insufficient to make ends meet. Overall, social and workers’ insurance cover only about three-fifths of the economic consequences of accidents, forcing victims to bear the remaining 40% themselves.” Reimann, *supra* note 67, at 828.

³³² See, e.g., Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 IND. L. REV. 645, 645 (2003) (“The free enterprise system is the engine that drives America’s healthy economy, the benefits of which necessarily include inherent risks. Unfortunately, many facets of America’s civil justice system operate to shift all of those risks to the entrepreneurs who produce the consumer goods and services that make people’s lives easier or more pleasant The tort system has undergone a transformation from one designed solely to redress wrongs to one focusing more and more on criminal-style retribution and redistribution of wealth.”). Although it is doubtful that this statement was ever true, it may have come closer to the truth some 30 years ago. It certainly is not true today.

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Given the courts' reaction to the Restatement (Third) of Products Liability (1998), there is some hope that, if people see clearly what is at stake in the current wave of tort reform, they may actually react progressively, putting torts back to work for democratic progress.

APPENDIX

Table 1

Economic Inequality: Lowest 10% compared to medium income; highest 10% compared to medium income; the Decile ratio of P90/P10; and the Gini coefficient³³³

COUNTRIES	P10	P90	P90/P10	GINI
Finland 2000	57%	164%	2.87719	0.247
Netherlands 1999	56%	167%	2.98214	0.248
Norway 2000	57%	159%	2.78947	0.251
Sweden 2000	57%	168%	2.94737	0.252
Germany 2000	54%	173%	3.2037	0.252
Austria 2000	55%	173%	3.1455	0.26
Luxembourg 2000	66%	215%	3.25758	0.26
Denmark 1992	54%	155%	2.8704	0.263
Belgium 2000	53%	174%	3.283	0.277
Switzerland 2000	54%	182%	3.3704	0.28
France 1994	54%	191%	3.537	0.288
Canada 2000	48%	188%	3.9167	0.302
Ireland 2000	41%	189%	4.6098	0.323
Italy 2000	44%	199%	4.5227	0.333
Spain 2000	44%	209%	4.75	0.34
United Kingdom 1999	47%	215%	4.5745	0.345
United States 2000	39%	210%	5.3846	0.369
Average	51.76%	184%	3.65	0.28765
Standard Deviation	6.94	19.83	0.812	0.04

³³³ Brandolini & Smeeding, *supra* note 58, at 22 fig.1.

Table 2

Inequality: Gini coefficients before and after taxes and benefits³³⁴

State	Market Gini	Post-benefits	reduction
Finland	38	25	34%
Netherlands	39	25	36%
Sweden	45	25	44%
Austria	43	26	39%
Germany	46	26	42%
Belgium	47	28	41%
France	49	29	47%
Canada	41	30	27%
Switzerland	39	30	20%
Ireland	44	32	27%
Italy	46	33	27%
Spain	47	34	28%
United Kingdom	50	35	31%
United States	47	37	22%
Average	44.36	29.64	33.21%

Table 3

Inequalities in Wealth: Gini coefficients based on net worth³³⁵

State	Gini
Japan	.547
Spain	.565
Italy	.609
Australia	.622
Netherlands	.649
Canada	.663
Germany	.671
France	.73
United Kingdom	.73
United States	.801
Switzerland	.803
Average	.6718
Stand. Deviation	.0864

³³⁴ Table based on extracted data. Brandolini & Smeedling, *supra* note 58, at 24 fig.2 (based on the Luxemburg Income Study).

³³⁵ Table based on data taken from DAVIES ET AL., *supra* note 69, at 48 tbl.10b.

Table 4
VAP statistics by country³³⁶

Country	VAP Parliamentary voter turnout 1945-2001
Italy	92%
Belgium	85%
Austria	84%
Sweden	84%
Netherlands	84%
Denmark	84%
Canada	83%
Germany	80%
Norway	79%
Finland	78%
Spain	76%
Ireland	75%
United Kingdom	74%
France	67%
Luxembourg	64%
Switzerland	52%
United States	48%
Average	76%

³³⁶ Derived from statistics of averages of voting age population ratios across 169 countries in parliamentary elections from 1945-2001 compiled by the International Institute for Democratic and Electoral Assistance. PINTOR ET AL., *supra* note 112, at 75, 83-84.

Table 5
UNICEF Child Well-Being Table (2007)³³⁷

1	Netherlands
2	Sweden
3	Denmark
4	Finland
5	Spain
6	Switzerland
7	Norway
8	Italy
9	Republic of Ireland
10	Belgium
11	Germany
12	Canada
13	Greece
14	Poland
15	Czech Republic
16	France
17	Portugal
18	Australia
19	Hungary
20	United States
21	United Kingdom

³³⁷ Derived from INNOCENTI RESEARCH CENTRE, *supra* note 77, at 2 (this ranking is a combined ranking based on: material well-being, family and peer relationships, health and safety, behavior risks, and both educational well-being and subjective well-being).

